91-1905

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

JOHN CARVER, AL SAMPSON,
BILL McCLUNG, DONALD J. MEYERS,
and MARTIN L. HAGOOD

Petitioners

v.

WESTINGHOUSE HANFORD COMPANY,
a corporation;
HANFORD OPERATIONS AND ENGINEERING PLAN

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. If the administrator of an ERISA-covered pension plan has failed to adopt a "formal" written plan document to govern the administration of the plan at the time when it has in fact begun to administer the plan, should the initial administration of the plan be legally governed under ERISA by more "informal" written documents which describe the important features of the plan and which have been distributed to plan participants in order to protect the rights of the plan participants as much as possible until a more "formal" plan document has been adopted?

2. If so, should the administrator of the pension plan then have to comply with the provisions of 29 USC §1054(g) and 29 USC §1082(c)(8) governing the

amendment of ERISA-covered pension plans if it thereafter seeks to adopt a more "formal" written plan document to govern the administration of the plan which would have the effect of reducing the accrued benefits of plan participants?

3. Does 29 USC §1060 require that, where an employer has "maintained" the pension plan(s) of one or more predecessor employers, the employer must then treat the service of plan participants with such predecessors as service with the employer for the purpose of calculating the pension benefits those participants are entitled to receive under the new plan?

4. Do the principles of estoppel legally require the administrators of ERISA-covered pension plans to abide by the promises that they have made to plan participants under the circumstances that

are involved in the instant matter and under similar circumstances that will undoubtedly arise in other cases?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed accurately in the caption of the case.

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REFERENCE TO REPORTS

See Appendix for reference to the official and unofficial reports of any opinions delivered in the courts below.

STATEMENT OF JURISDICTION

The instant petition was filed with this Court within ninety (90) days of the date upon which the Ninth Circuit Court of Appeals rendered its decision in this matter, December 17, 1991, as provided for by the rules of this Court. This Court's jurisdiction is invoked under 28 USC §1254.

STATEMENT OF THE CASE

In this lawsuit, the plaintiffs are contending that the defendants have reneged upon a legally-binding commitment which they made to the plaintiffs to the effect that the plaintiffs would receive credit under a pension plan that was being operated and administered by the

defendants, and in which the plaintiffs became participants in June of 1987, for certain of their prior years of employment service with previous employers when their pension benefits were being calculated under this new pension plan, the Hanford Operations and Engineering Pension Plan (the HOEPP). The parties herein are the plaintiffs; their current or former employer, defendant Westinghouse Hanford Company (WHC); and the HOEPP. (See Amended Complaints contained in Appendix).

At the time when this lawsuit was commenced, all of the plaintiffs were employed by WHC at the Hanford Nuclear Reservation near Richland, WA (the HNR). (See Stipulation of Facts in Appendix). The HNR is, and has been for many years, under the control and management of the U. S. Department of Energy (DOE). (Id).

DOE delegates the responsibility for maintaining the day-to-day operation of the facilities at the HNR to private contractors. (Id). Over the years, the identity of these private contractors has changed repeatedly. (Id). However, throughout this period of time a significant segment of the workforce at the HNR has remained constant, and employees such as the plaintiffs have simply been transferred from one contractor to another contractor when a change in contractors has taken place. (Id). All of the plaintiffs herein have worked for several of these different private contractors while they were employed at the HNR. (Id).

Immediately prior to June of 1987, DOE had delegated the responsibility for operating the facilities at the HNR to several different private contractors.

(Id). As of June 29, 1987, DOE consolidated the responsibility for operating most of the facilities at the HNR in the hands of a single private contractor, WHC. (Id).

Prior to this "consolidation" on June 29, 1987, each of the private contractors at the HNR had operated its own pension plan. (Id). It was decided by DOE prior to "consolidation" that a new site-wide pension plan for the non-union employees who continued to work at the HNR after "consolidation" should be adopted at the time of consolidation, and that the assets of all of the previous non-bargaining unit pension plans that had been in existence at the HNR should be merged into this pension plan at the time of consolidation. (Id).

WHC took the position, both before and after June 29, 1987, during

negotiations that it had with DOE about how the new pension plan should be constituted, that the new plan should recognize all of an employee's post-1965 years of service at the HNR for benefit calculation purposes. (Id). WHC took this position, at least in part, so that it could provide an additional "perk" to its non-union employees that was not enjoyed by its union employees. (See affidavit excerpt in Appendix).

At the time of consolidation on June 29, 1987, each plaintiff herein became an employee of WHC, with no material change in his job duties or salary. (See Stipulation). At or around the time of consolidation, WHC provided the plaintiffs herein, as well as similarly-situated employees, with several documents containing information about the new "consolidated" pension plan for

non-union employees that was going to become effective on June 29, 1987. (Id). The defendants have admitted that, based upon the content of these documents, the plaintiffs reasonably believed at the time of consolidation, that when their benefits were being calculated under the new HOEPP pension plan, they would receive credit for all of their prior years of service with all of the DOE contractors that were operating at the HNR from January 1, 1965 onward. (Id).

Additionally, during the period of time between June and December of 1987, at least three individuals who became participants in the HOEPP on June 29, 1987 retired from WHC's employment and were given credit when their pension benefits were being calculated under the new HOEPP pension plan for all of their prior years of service with all Hanford

contractors during 1965 and thereafter; that is, their benefits under the HOEPP were calculated in the manner in which the plaintiffs are contending that the plaintiffs' benefits should be calculated under the HOEPP. (Id).

Even though the defendants began administering the HOEPP in June of 1987, as described above, they did not adopt what they considered to be a formal written "plan document" relating to the HOEPP until December of 1987. (Id). The plaintiffs contend that the written information about the HOEPP that was distributed to the plaintiffs on or about June 29, 1987 did in fact constitute a "plan document". (Id). The "plan document" that was adopted by the defendants in December of 1987 specifically provides that the plaintiffs and other similarly-situated HOEPP

participants are not entitled to have their prior years of service with other Hanford contractors recognized for benefit calculation purposes under the HOEPP unless those prior years of service were recognized for that purpose by the contractor for whom the employee was working immediately prior to consolidation. (See Appendix). When the defendants adopted their "formal plan document" in December of 1987, they did not comply with the procedures that are set forth in 29 USC §1054(g) and 29 USC §1082(c)(8). (See Stipulation).

It was not until the first half of 1988 that the plaintiffs first learned that the defendants were going to refuse to link together their prior years of service for pension benefit calculation purposes under the HOEPP when they retired. (Id). As a result of the

defendants' refusal to credit the plaintiffs' prior years of service when their pension benefits were being calculated under the HOEPP, the plaintiffs commenced the instant lawsuit against the defendants in the Federal District Court for the Eastern District of Washington. (See Amended Complaint). The District Court had jurisdiction of this matter pursuant to 29 USC §1132. After discovery, the parties eventually entered into a Stipulation of Facts, which they submitted to the trial court, and they then filed cross-motions for summary judgment. (See District Court decision in Appendix). On July 18, 1990, District Court Judge Alan McDonald granted the defendants' motion for summary judgment, and denied the plaintiffs' motion for summary judgment. (Id). Thereafter, Judge McDonald denied

the plaintiffs' timely motion for reconsideration. (See Order Denying Reconsideration in Appendix). The plaintiffs then filed a timely appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the decision of the District Court in a decision rendered on December 17, 1991. This timely Petition for Certiorari has followed.

ARGUMENT

A. THE DEFENDANTS ARE REQUIRED BY ERISA TO PROVIDE THE PLAINTIFFS WITH THE CREDIT FOR PRIOR SERVICE WHICH THE PLAINTIFFS WERE PROMISED THEY WOULD RECEIVE.

WHC repeatedly assured the plaintiffs and other similarly-situated individuals in writing, both before and after June 29, 1987, that a new WHC pension plan for non-bargaining unit employees was going to "become effective"

on June 29, 1987 and that participants in this new plan (the HOEPP) would begin earning credit under the plan on June 29, 1987. (See Stipulation). The documents in which these assurances were made contained a description of most of the important features of the new pension plan. (Id).

Furthermore, the defendants then in fact began administering the HOEPP on June 29, 1987 (i.e., at least three individuals actually retired under the HOEPP between June 29, 1987 and the time when the "formal HOEPP plan document" was "adopted" by the defendants in December of 1987). (Id).

Thus, given this undisputed factual situation, it is clear that the HOEPP became effective and was "established" for the purposes of ERISA coverage on June 29, 1987. Scott v. Gulf Oil

Corporation, 754 F.2d 1499 (9th Cir., 1985); Donovan v. Dillingham, 688 F.2d 1367 (11th Cir., 1982); Robbins v. Lynch, 836 F.2d 330 (7th Cir., 1988); Petrella v. N. L. Industries, 529 F.Supp. 1357 (D. NJ, 1982); California Hospital Assn. v. Henning, 569 F.Supp. 1544 (C.D. Cal., 1983); Blau v. Del Monte Corporation, 748 F.2d 1348 (9th Cir., 1984); Dippel v. Joint Board of Trustees of Operating Engineers, 97 LC ¶10357 (D. D.C., 1982).

The rationale for extending ERISA coverage to employee benefit plans which in fact exist and which are being administered even though no formal written "plan document" has yet been adopted by the administrator of the employee benefit plan is set forth clearly in both the Scott and the Donovan decisions:

> "Failure to meet . . . (the ERISA requirement that a plan

> must be administered pursuant to a written instrument) . . . does not exempt an employer from coverage by ERISA. Such failure merely indicates a failure by the employer to comply with ERISA. Were such failure to exempt an employer from coverage by ERISA, employers could escape ERISA's coverage merely by failing to comply with its requirements. . . ."

Scott, supra, at 1503-1504.

Thus, based upon the foregoing discussion, it is clear that the HOEPP came into existence on June 29, 1987 and was covered by ERISA from that date forward. Scott, supra; Donovan, supra; Blau, supra. (See also 29 USC §1054(f)).

Given the fact that the HOEPP undisputedly came into existence and was being administered on June 29, 1987, the question arises as to which document or documents should be held to have governed the administration of the HOEPP during the period of time between June 29, 1987

and December of 1987. The plaintiffs contend that the administration of the HOEPP during this period of time was governed by the documents contained in Attachment C to the parties' Stipulation, since those documents were the only written instruments in existence which described the HOEPP during that period of time. The defendants are contending that the administration of the HOEPP between June and December, 1987 was governed by the "plan document" which did not even exist until December of 1987. District Court Judge McDonald and the Ninth Circuit Court of Appeals agreed with the defendants. Plaintiffs respectfully submit that such a holding, if allowed to stand, would seriously undermine the principles behind the enactment of ERISA.

ERISA was enacted because Congress was concerned about the inequitable

manner in which pension plans had often been administered by employers in the past. (See 29 USC §1001(a)). ERISA is remedial in nature, and its provisions must be construed in the light that is most favorable to participants in employee benefit plans. Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir., 1984). ERISA was enacted to: provide security to participants in employee benefit plans; provide those participants with knowledge about their rights and benefits under employee benefit plans; and to allow those participants to police the manner in which their employee benefit plans were being administered. Blau, supra, at 1356; Scott, supra, at 1503-1504; Donovan, supra, at 1373.

ERISA also established "minimum standards" which plan administrators were

required to adhere to when they were administering employee benefit plans. (See 29 USC §1001(a)). One of these "minimum standards" is that every employee benefit plan must be "established and maintained" pursuant to a "written instrument". (See 29 USC §1102(a)(1)). The responsibility to adopt a "written instrument" to govern the administration of an employee benefit plan is a fiduciary responsibility that is placed upon the administrator of such a plan by ERISA, rather than a prerequisite to the establishment of coverage under ERISA. Donovan, supra; Scott, supra.

The defendants in this matter undisputedly failed to promulgate a "formal plan document" of the nature that would normally be expected to exist in order to govern the administration of a

pension plan such as the HOEPP until several months after they had begun administering the HOEPP. Thus, this case squarely presents the question of what legal consequences should flow from the failure of the administrator of a pension plan to adopt, at the time when it begins to administer the plan, a written document which would allow the participants in the plan to become as knowledgeable about the plan and the way that it is being administered as is contemplated by ERISA.

Clearly, both existing case law and the policy considerations which led to the enactment of ERISA compel a conclusion that plan participants must be provided with as much protection as possible, and that therefore, plan administrators must be required to adhere to whatever written documents, either

"formal" or "informal" that the plan administrators have in fact promulgated concerning the terms and/or the administration of an employee benefit plan in a particular instance at the time when the administration of the plan actually commences, and that furthermore, plan administrators must thereafter comply with ERISA's requirements for amending an employee benefit plan if they later wish to adopt a more "formal plan document" to govern the terms and the administration of their plan. Blau, supra; Scott, supra; Donovan, supra; Petrella, supra; California Hospital Assn. v. Henning, supra; Dippel, supra; 29 USC §1101(a); 29 USC §1102(a)(1); McKnight v. Federal Life and Health Insurance Co., 768 F.2d 1566 (11th Cir., 1985); 29 USC §1022 (requiring distribution of summary plan

description).

In this instance, the only written documents which the defendants had promulgated concerning the terms and the administration of the HOEPP as of June 29, 1987 are the documents that are contained in Attachment C to the parties' Stipulation. Therefore, under existing case law and under the policy consideration that led to the enactment of ERISA in the first place, the appellants respectfully submit that those documents must be held to constitute the documents that governed the administration of the HOEPP pursuant to 29 USC §1102(a)(1) during the period of time between June and December of 1987. (Id).

A review of the documents that are contained in Attachment C shows that they are: clear and unambiguous; and that

they entitle the plaintiffs to receive the benefits which they are seeking in this matter (i.e., they contain unambiguous promises that plaintiffs will receive credit under the HOEPP for benefit calculation purposes for their prior years of service with past Hanford contractors and/or with their parent companies).

When the defendants adopted their "formal HOEPP plan document" in December of 1987 they admittedly did not follow, and have not followed to date, the procedures for amending an employee benefit plan that are set forth in 29 USC §1054(g) and 29 USC §1082(c)(8). As a result, well-established case law makes it clear that the defendants' adoption of this "formal HOEPP plan document" constituted a legally ineffective attempt by the defendants to amend the HOEPP in a

manner that would illegally reduce the "accrued benefits" of participants in the HOEPP, including the plaintiffs. Meagher v. Int'l. Assn. of Machinists, 856 F.2d 1418 (9th Cir., 1988); Shaw v. IAM&AW Pension Plan, 750 F.2d 1458 (9th Cir., 1985); Batchelor v. IBEW Local 861, 877 F.2d 441 (6th Cir., 1989); Collins v. Seafarers' Pension Trust, 846 F.2d 936 (5th Cir., 1988); Hoover v. Teamsters Pension Fund, 756 F.2d 977 (3rd Cir., 1985).

Three of the cases cited above involved nearly identical factual situations to the one that is presented in the instant matter, where pension plans were amended in such a manner that the number of years of a participant's service that could be taken into account when the participant's pension benefits were being calculated were reduced by the

amendment, and in each such instances, the plan administrators were found to have violated 29 USC §1054(g) and 1082(c)(8). Hoover, supra; Collins, supra; Batchelor, supra.

Therefore, because the defendants did not comply with the provisions of 29 USC §1054(g) and 29 USC §1082(c)(8) in connection with their attempted amendment of the HOEPP in December of 1987, plaintiffs respectfully submit that their attempted amendment of the HOEPP was, at least to that extent, legally ineffective. Shaw, supra; Meagher, supra; Batchelor, supra; Collins, supra; Hoover, supra. A plan administrator's failure to follow the procedures that are set forth in 29 USC §1054(g) and 1082(c)(8) constitutes a substantive violation of ERISA as opposed to a procedural violation, and thus, requires

that relief should be granted to parties that complain about such a violation in every instance. (Id).

The administrator of an employee benefit plan may only administer the plan pursuant to written documents that are consistent with the provisions of ERISA. See 29 USC §1104(a)(1)(D). Thus, since the provisions of the "formal HOEPP plan document" had the effect of reducing the plaintiffs' accrued benefits under the HOEPP, and therefore, were clearly violative of ERISA, they were legally ineffective and cannot be used as a basis for administering the HOEPP. (Id); Meagher, supra.

Instead, the HOEPP must be administered only in a manner that is consistent with the HOEPP governing documents that are in compliance with ERISA. Id. In this instance, the only

such documents are the documents that are contained in Attachment C to the parties' Stipulation. Shaw; Meagher. Therefore, the plaintiffs respectfully request this Court to order that the defendants must administer the HOEPP in the future in this respect in a manner which is consistent with the documents that are contained in Attachment C, and to order the defendants to make the plaintiffs whole for any losses which they have suffered to date, or which they will suffer in the future, as a result of the fact that the defendants have improperly administered the HOEPP in this regard in the past.

B. THE DEFENDANTS' VIOLATION OF 29 USC §1060(b) ALSO ENTITLES THE PLAINTIFFS TO THE RELIEF WHICH THEY ARE SEEKING IN THIS LAWSUIT.

It is undisputed that on June 29, 1987 WHC became a "successor employer"

under the pension plans that had been maintained by the various private contractors that had been operating at the HNR immediately prior to June 29, 1987, and that the assets of those pension plans were "merged" into the new WHC site-wide pension plan for non-bargaining unit employees at the time of consolidation on June 29, 1987. Furthermore, the documents that were distributed to the plaintiffs on or about June 29, 1987 also indicated that the HOEPP was going to be a "multiple employer plan" that was to become effective on June 29, 1987. As of June 29, 1987 WHC also in fact began administering the HOEPP. The defendants also characterized the HOEPP as an "amendment" and "restatement" of several pre-consolidation pension plans at the HNR.

The legislative history of ERISA provides the following amplification of the intent behind the adoption of 29 USC §1060(b):

> "Service with a predecessor employer must be counted for purposes of the plan if the successor employer continues to maintain the plan of the predecessor employer (and, of course, the successor employer cannot evade this requirement by nominally discontinuing the plan). The question of the extent to which such service must be counted in other circumstances is to be determined under regulations." (emphasis added)

ERISA legislative history (1974-1986), Joint Explanatory Statement of the Conference Committee on the Employment Retirement Income Security Act, p. 10 (BNA 1988).

Under the circumstances presented here, the defendants clearly "maintained" the pension plans of the contractors who had been operating at the HNR immediately

prior to June 29, 1987 within the meaning of 29 USC §1060(b) on June 29, 1987 and thereafter when the defendants began administering the HOEPP. (29 USC §1060(b)). Therefore, since the defendants have chosen to maintain the pension plans of several different predecessor employers of the plaintiffs in this matter, the defendants were required by 29 USC §1060(b) to treat the years of service which the plaintiffs had accumulated with each one of those predecessor employers as having been earned under the HOEPP. (See 29 USC §1060(b)).

C. THE PRINCIPLES OF ESTOPPEL ALSO ENTITLE THE PLAINTIFFS TO THE RELIEF WHICH THEY ARE SEEKING IN THIS LAWSUIT.

The traditional doctrine of estoppel should also have entitled the plaintiffs to prevail in this action as well. Blau,

supra; McKnight, supra; Kochendorfer v. Rockdale Sash and Trim Company, Inc., 753 F.Supp. 612 (N.D. of Ill., 1987); Gors v. Venoy, Inc., 578 F.Supp. 365 (E.D. Mich., 1984); Ellenburg v. Brockway, Inc., 763 F.2d 1091 (9th Cir., 1985); Zittrouer v. UARCO, Inc., 582 F.Supp. 1471 (N.D. Ga., 1984).

Based upon the factual situation presented here, and based upon the foregoing case law, plaintiffs would also ask this Court to enter an order to the effect that the defendants were estopped from administering the HOEPP in a manner that would not take into account for benefit calculation purposes the pre-consolidation years of service which the plaintiffs are contending that they have a right to have taken into account under the provisions of the HOEPP. Blau, supra; Ellenburg, supra.

SUMMARY AND CONCLUSIONS

Plaintiffs therefore, for the foregoing reasons, respectfully request this Court to grant their Petition for Certiorari, and, in due course, to reverse the decision of the Ninth Circuit in this matter, and to grant the plaintiffs all of the relief which they are seeking herein.

Respectfully submitted,

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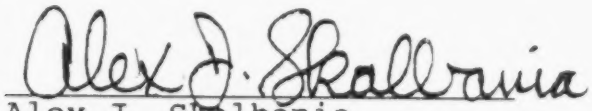
By: 
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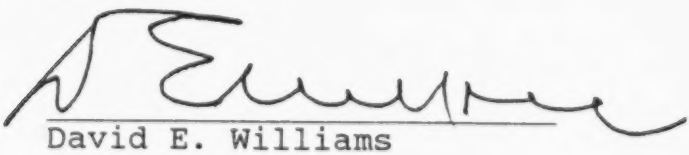
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VOLUME 1 OF 3
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, AL SAMPSON, HERBERT BARRUS, BILL McCLUNG, LEONARD F. LUST and DONALD J. MEYERS, Plaintiffs, vs. WESTINGHOUSE HANFORD COMPANY, a corporation, and HANFORD OPERATIONS AND ENGINEERING PENSION PLAN, Defendants.	)	No. C-88-391-AAM AMENDED COMPLAINT FOR DECLARATORY JUDGMENT and INJUNCTIVE RELIEF

Plaintiffs and each of them, by this Amended Complaint, seek declaratory and injunctive relief and allege as follows:

PARTIES

1. Plaintiffs and each of them are residents of the State of Washington, residing in the Eastern District of the State of Washington. The defendant Westinghouse Hanford Company is a corporation authorized to do business within the Eastern District of the State of Washington. The defendant Westinghouse Hanford Company is also the administrator and sponsor of the Hanford Operations and Engineering Pension Plan (HOEPP), and the plaintiffs are bringing this suit against the defendant Westinghouse Hanford Company in its capacity as the administrator and sponsor of the HOEPP. (See 29 USC §1132(a)). The defendant Hanford Operations and Engineering Pension Plan is a "qualified pension plan" within the meaning of 29

USC §1001 et. seq.

JURISDICTION

2. Jurisdiction is conferred on this court by 29 USC §1132(e).

BACKGROUND

3. The plaintiffs and each of them on June 29, 1987 became employees of the defendant Westinghouse Hanford Company and they remain employees of the defendant Westinghouse Hanford Company.

4. Prior to becoming so employed with the defendant Westinghouse Hanford Company, plaintiffs were provided with written information which stated that for those employees who would accept employment with the defendant Westinghouse Hanford Company, the Hanford Operations and Engineering Pension Plan (HOEPP) would be applicable to them. The defendant Westinghouse Hanford Company

further represented that HOEPP was an amendment and a restatement of defendant Westinghouse Hanford Company's predecessors' pension plans, i.e., the Westinghouse Hanford Company pension plan, the Rockwell Hanford Operations pension plan for non-represented employees, the UNC Nuclear Industries, Inc. pension plan, and the BCS Richland, Inc. pension plan.

5. The defendant Westinghouse Hanford Company represented in written materials to the plaintiffs that employees with prior years of service under any of the above-mentioned pension plans would be treated as if those prior years of service had been earned under a single employer, i.e., the defendant Westinghouse Hanford Company, for pension calculation purposes. That, as a

condition to the applicability of this proposal to any of its prospective employees the defendant Westinghouse Hanford Company represented that certain "break in service" requirements must be met. The plaintiffs all meet the "break in service" requirements.

6. Based in part on the above-mentioned representations of the defendant Westinghouse Hanford Company, the plaintiffs accepted the defendant Westinghouse Hanford Company's offer of employment.

CAUSE OF ACTION

7. The defendant Westinghouse Hanford Company has now offered a Special Voluntary Early Retirement Program (SVERP) which must be exercised on or before July 29, 1988.

8. The plaintiffs have been

provided with forms supplied by the defendant Westinghouse Hanford Company, completion of which is necessary to elect to participate under SVERP. As a part of that application process, the applicant is required to elect to participate in SVERP in such a way that he may be precluded from claiming prior years of service in the aforementioned pension plan.

9. All of the plaintiffs have a common and mutual interest in the interpretation of their rights under HOEPP, and each of them will be substantially and irreparably damaged, either now or in the future, if they are required to accept the defendant Westinghouse Hanford Company's interpretation of their rights under HOEPP.

10. 29 USC §1132(a)(1)(b) empowers all participants or beneficiaries in a pension plan such as the HOEPP to bring a civil action to clarify their rights to future benefits under the plan. The plaintiffs herein, and each and every one of them, hereby request this court to clarify their respective rights in the HOEPP by means of this action, and to take whatever action is necessary in order to enforce their rights in the HOEPP.

11. Plaintiffs hereby request this court to rule that the provisions of the HOEPP expressly entitle the plaintiffs to have their prior years of pension service mentioned above credited for pension calculation purposes under the HOEPP, or in the alternative, that the defendant Westinghouse Hanford Company is now

estopped from interpreting and administering the HOEPP in a manner that would prevent the plaintiffs' prior years of pension service mentioned above from being credited under the HOEPP for pension calculation purposes.

RELIEF

WHEREFORE, the plaintiffs and each of them pray that this court declare their rights under HOEPP pursuant to Title 28 USC §2201, FRCP 57 and 29 USC §1132(a)(1)(B) and to grant their request for injunctive relief pursuant to FRCP 65(b), and pursuant to 29 USC §1132(a)(3) and for such other and further relief as to the court may seem just and equitable, and for an award for their costs and reasonable attorneys' fees incurred herein.

DATED: This 11th day of January,

1989.

CRITCHLOW & WILLIAMS
Attorneys for Plaintiffs

By: S/ Eugene G. Schuster

S/ Alex J. Skalbania

(Filed in U. S. District Court, E.D. of Washington, 1/17/89)

David E. Williams
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Richland, Washington 99352
Phone: (509) 946-6181
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

MARTIN L. HAGOOD, Plaintiff, vs. WESTINGHOUSE HANFORD COMPANY, a corporation, and HANFORD OPERATIONS AND ENGINEERING PENSION PLAN, Defendants.	No. C-88-582-AAM AMENDED COMPLAINT

COMES NOW the plaintiff and complains of defendant and for cause of action alleges:

I

Plaintiff is a resident of the State of Washington, residing in the Eastern

District of the State of Washington. The defendant Westinghouse Hanford Company is a corporation authorized to do business in the State of Washington and in fact is doing business within the Eastern District of the State of Washington. The defendant Westinghouse Hanford Company is also the administrator and sponsor of the Hanford Operations and Engineering Pension Plan (HOEPP), and the plaintiff is bringing this suit against the defendant Westinghouse Hanford Company in its capacity as the administrator and sponsor of the HOEPP. (See 29 USC §1132(a)). The defendant HOEPP is a "qualified employee pension plan" within the meaning of 29 USC §1001 et. seq.

II

Jurisdiction is conferred upon this court by 28 USC §2201, 29 USC §1132(e),

29 USC §1022, and 29 USC §1104.

III

Plaintiff is a former employee of the defendant Westinghouse Hanford Company (WHC), as well as a former employee of the Boeing Company, and by virtue of such service, is entitled to receive certain pension rights and benefits under the HOEPP.

IV

Because of a "consolidation" of Department of Energy (DOE) contractors at the Hanford Project in June of 1987, the defendant Westinghouse Hanford Company became the sole DOE contractor at the Hanford site, and as a result, the plaintiff became an employee of the new "consolidated" WHC as of June 29, 1987.

V

Prior to June 29, 1987, the

plaintiff received written documents from the defendant(s) which stated that for those employees who would accept employment with the defendant WHC after "consolidation", the HOEPP would be applicable to those employees. This written information further represented that the HOEPP was an amendment and a restatement of several prior pension plans, including the Westinghouse Hanford Company's previous pension plan, the Rockwell Hanford Operations pension plan for non-represented employees, the UNC Nuclear Industries, Inc. pension plan, and the Boeing Computer Services Richland, Inc. pension plan. This written information represented further that employees such as the plaintiff who had earned prior years of service that were credited for pension benefit

calculation purposes under any of the above-mentioned pension plans (the plaintiff had earned prior years of service that were credited under the Boeing Computer Services Richland, Inc. plan) would be entitled to have those prior years of service treated as if they had been earned under a single employer, i.e., as if they had been earned while in the employment of the Westinghouse Hanford Company, for pension benefit calculation purposes. This written information also contained representations that the only preconditions that a prospective employee of the new "consolidated" Westinghouse Hanford Company would have to meet in roder to have the above-described prior years of service considered for the purposes of calculating that employee's

pension benefits under the HOEPP would be for the employee to meet certain "break in service requirements", and for the employee to send in to the Westinghouse Hanford Company a "restoration of service questionnaire" asking that such prior service be restored for pension benefit calculation purposes. The plaintiff met the above-described break in service requirements, and he sent in the "restoration of service questionnaire" to the WHC in a timely manner. Calculating the plaintiff's pension benefits in the fashion that he was promised that they would be calculated by the defendant(s) would have resulted in a significant increase in the amount of pension benefits that the plaintiff would have been entitled to under the HOEPP.

VI

Based in part upon the above-mentioned representations of the defendant(s) regarding the restoration of his prior years of service for pension benefit calculation purposes under the HOEPP, the plaintiff accepted WHC's offer of employment as of June 29, 1987, at least in part in reliance upon the above-described representations, and he also continued in the Westinghouse Hanford Company's employ for some time thereafter, in part, because of his continued reliance upon the above-described representations as to the pension benefits that he would receive under the HOEPP. The plaintiff also requested an early retirement from the employment of WHC under a program that was sponsored by WHC in November of 1987, at least in part, in reliance upon the

defendant(s) representations that the plaintiff's prior years of service with the Boeing Company would be included for the purpose of calculating the amount of pension benefits that the plaintiff would be entitled to receive under the HOEPP. Mr. Hagood would not have opted to participate in such an early retirement program if he had been aware that his prior years of service with the Boeing Company would not be included for the purpose of calculating his HOEPP benefits, and Mr. Hagood has now suffered substantial and irreparable monetary damage because of his participation in the early retirement program, given the defendant(s) current interpretation and application of the HOEPP.

VII

Plaintiff has made due and proper

demand of defendant(s) for the restoration of the above-described service credits, and for the commensurate enhancement of his pension rights and benefits under the HOEPP, as he was promised that he would receive by the defendant(s), but the defendant(s) has repeatedly rejected the plaintiff's demand for the restoration of such credit and enhancement of his pension rights and benefits as described above.

VIII

Attached hereto and made a part hereof by this reference are true and correct copies of memoranda and correspondence between the plaintiff and the defendant(s) whereby plaintiff claims the credits and benefits aforesaid and whereby defendant(s) wrongfully deny the same.

IX

Under the circumstances involved herein, some or all of the written documents that were provided to the plaintiff by the defendant(s) regarding the HOEPP on or about the time of "consolidation" on June 29, 1987, including specifically the document that is entitled "Pension Plan Service Credits For Non-Bargaining Unit Employees", constituted summary plan descriptions for the purpose of 29 USC §1022.

X

Plaintiff will be substantially and irreparably damaged if he is forced to accept the defendant(s) current interpretation and administration of the HOEPP with respect to the benefits which the plaintiff is entitled to receive thereunder.

WHEREFORE, the plaintiff prays this court for judgment: that the governing provisions of the HOEPP, contained either in the HOEPP plan document itself, or in superseding summary plan descriptions of that plan, expressly entitle the plaintiff to have his prior years of pension service with the Boeing Company credited for pension benefit calculation purposes under the HOEPP, and that therefore the defendant(s) should be ordered to: restore such service credits to the plaintiff; to recalculate the future HOEPP benefits that the plaintiff is entitled to receive based upon the inclusion of those service credits for pension benefit calculation purposes; and to fully compensate the plaintiff for any monetary damages which he has already suffered because of the defendant(s)

previous erroneous calculation as to the amount of HOEPP benefits that the plaintiff is entitled to receive; that the defendant(s) denial of the relief which teh plaintiff is seeking herein constituted a breach of the defendant(s) fiduciary duties pursuant to 29 USC §1104; that the summary plan description(s) which was provided to the plaintiff by the defendant(s) violated 29 USC §1022, and therefore entitles the plaintiff to the relief which he is seeking herein; and/or that the doctrine of equitable estoppel entitles the plaintiff to the relief which he is seeking herein.

The plaintiff also prays this court for an award of his taxable costs and disbursements herein, for an award of his reasonable attorneys' fees in this

matter, and for an award of such other and further relief as to the court may seem equitable, warranted or required in the premises.

DATED: This 3rd day of February, 1989.

CRITCHLOW & WILLIAMS
Attorneys for Plaintiff

By: S/ Alex J. Skalbania

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al, and MARTIN L. HAGOOD,	)	No. C-88-582-AAM
Plaintiffs,	)	ORDER OF CONSOLIDATION
vs.	)	
WESTINGHOUSE HANFORD COMPANY, et al,	)	
Defendants.	)	

Upon review of the records in Hagood v. Westinghouse Hanford Co., Cause No. C-88-582-AAM, and Carver v. Westinghouse Hanford Co., Cause No. C-88-391-AAM, the court observes that these actions contain common questions of law and fact and, accordingly, that substantial economics might be achieved through consolidation. Fed.R.Civ.P. 42(a) (1988) states:

> When actions involving a common question of law or fact are pending before the court, it

> may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary cost or delay.

See also Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933). Therefore,

IT IS HEREBY ORDERED that Hagood v. Westinghouse Hanford Co., C-88-582-AAM and Carver v. Westinghouse Hanford Co., C-88-391-AAM be CONSOLIDATED. A telephone status conference is currently scheduled in the Hagood action for July 13, 1989. The scheduling order issued as a result of that conference shall govern for purposes of this consolidated action.

IT IS SO ORDERED. The Clerk is directed to enter this order and forward copies to counsel.

DONE BY THE COURT this 27th day of July, 1989.

S/ ALAN A. McDONALD
United States District Judge
(Filed 7/27/89)

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al and MARTIN L. HAGOOD,	)	No. C-88-391-AAM Consolidated w/: No. C-88-582-AAM
Plaintiffs,	)	AFFIDAVIT OF ALEX J. SKALBANIA
vs.	)	
WESTINGHOUSE HANFORD COMPANY, et al,	)	
Defendants.	)	
STATE OF WASHINGTON	)	
	:	ss
County of Benton	)	

ALEX J. SKALBANIA, being first duly sworn, deposes and says:

I am an attorney-at-law representing the plaintiffs in this lawsuit. I make

this affidavit in support of plaintiffs' motion for summary judgment, and to authenticate excerpts of deposition transcripts taken in this case.

Attached to this affidavit is a true and correct copy of an excerpt of the deposition of Michael Byrd which was taken on April 17, 1990 herein.

S/ Alex J. Skalbania

SUBSCRIBED and SWORN to before me this 11th day of June, 1990.

S/ Kathleen Jo Caraway
Notary Public in and for the State of Washington,
residing at Richland.

subjects.

Q All right. Did you participate in that discussion yourself?

A Yes, I did.

Q Did you take a personal position during those discussions as to how those prior years of service ought to be treated?

A If I may answer the question in rather than a yes or a no, the bargained unit plan was going to be implemented shortly, and at that point in time we didn't know when the non-bargained plan was going to be implemented. We didn't know when the consolidation was exactly going to be.

There was a thought that was prevalent that if the bargaining unit has

a plan, we want to make sure that we have at least the same benefits that that plan has in the non-bargaining plan, and if possible is there some way that we could give it some additional perk that it would separate it from the bargaining plan. That was always a thought in this discussion type of a process.

As far as my personal position and taking a position on that, I agreed that there should probably be some sort of a perk. Whether or not I totally agreed that we should link all of the service up or not, I think if you hit me on one day I might have given you a yes and

STIPULATION

A. INTRODUCTION

The following facts may be taken as true by the court for the purpose of the parties' respective motions for summary judgment, except where the existence of a dispute is indicated, in which case the positions of the respective parties should be taken as offers of proof. The parties have agreed that, for the purpose of their respective motions for summary judgment, the parties may also supplement the following facts by presenting additional consistent testimony to the court from depositions, or by presenting additional exhibits or affidavits, subject to the usual rules pertaining to the admission and use of depositions and exhibits in connection with such motions.

The parties herein have agreed to

enter into this Stipulation solely for the purpose of attempting to simplify the issues that will be presented to the court by means of the parties' respective motions for summary judgment. In the event issues remain for trial, this stipulation shall be of no further force and effect. Nor shall this negotiated stipulation have any effect or any evidentiary value in any other case. However, the parties are also in agreement that, should a trial become necessary in this matter, the parties will once again attempt to enter into a similar stipulation at that time in an effort to limit the evidence that it is necessary to present to the court.

B. ISSUE

The central issue in this lawsuit involves a dispute as to whethe

rplaintiffs are entitled to have certain periods of their prior employment recognized in the calculation of their pension benefits. The plaintiffs contend that they are entitled to receive credit for these periods of employment when their pension benefits are being calculated, and defendants contend that the plaintiffs are not entitled to receive credit for these periods of employment when their pension benefits are being calculated.

C. BACKGROUND

1. History. The Hanford Nuclear Reservation (the HNR or the "site") is under the control and management of the U. S. Department of Energy (DOE). Prior to June 29, 1987, DOE delegated the responsibility for maintaining various aspects of the day-to-day operation of

the HNR to several private contractors. These contractors included:

UNC Nuclear Industries, Inc. (UNC)
Rockwell Hanford Operations (RHO)
Pacific Northwest Laboratories (Battelle)
Boeing Computer Services Richland Operations (BCSR)
Westinghouse Hanford Co. (WHC)

2. Consolidation. In 1986, DOE decided to consolidate the primary responsibility for maintaining the day-to-day operation of the HNR in the hands of a single private contractor. In mid-December, 1986, DOE announced the selection of the defendant Westinghouse Hanford Company as the consolidated contractor. Consolidation was to be accomplished by October, 1987; this date was later advanced to June 29, 1987.

D. CONSOLIDATED PENSION PLAN

3. Prior plans. Of the many

administrative matters that had to be resolved in connection with consolidation, one group of issues involved pension plans. Prior to consolidation, each of the above-named contractors operated its own pension plan for its own employees at the HNR. Principal provisions of the old WHC plan, the old RHO plan, and the old UNC plan are summarized on Attachment A.

4. Consolidation. Since it was anticipated that the large majority of the employees at the Hanford Site would become employees of the consolidated contractor at the time of the consolidation, it was decided prior to consolidation that a new site-wide pension plan should be adopted at the time of consolidation, into which the assets of the previous pension plans on

the site would be merged. This new plan would, of course, have to be designed in order to accommodate the very different schemes of the predecessor pension plans. After it became known in December of 1986 that WHC was going to become the consolidated contractor at the HNR, and thus, hte principal sponsor of the new site-wide pension plan, WHC took the lead among the existing contractors at the HNR in negotiating with DOE over what the specific features of the new proposed site-wide pension plan would be.

5. Structure of the Plan. The new site-wide pension plan was envisioned by WHC as a "final pay" plan, with a "graduated vesting schedule". Subject to certain exceptions and qualifications, the monthly retirement benefit (based on a 10-year-certain-and-life annuity) would

be 1.6% of average monthly compensation over the "high five" compensation years, times the numbers of years (or fractional years) of employment that were recognized under the plan. With similar exceptions and qualifications, employees were 60% vested after five years of service, rising to 100% after ten years of service. Both for purposes of vesting and for purposes of calculating benefits, therefore, it is important to know what prior service "counts".

6. Prior Service. One issue that needed to be resolved by WHC when it was developing its new site-wide pension plan was the manner in which its employees, both old and new, would receive recognition under the provisions of the new pension plan for the years of service that they had previously accumulated with

WHC and/or its affiliates, and/or with the other contractors at the HNR and/or with their affiliates.

7. Initial Westinghouse Position. For several reasons, WHC initially took the position that, for the purpose of calculating an employee's benefits under the new site-wide pension plan, the plan should recognize all of an employee's prior years of service (post-1965) at the HNR with all of the contractors that are listed in Paragraph No. 1 of this Stipulation (UNC, RHO, Battelle, BCSR, and WHC).

8. DOE's Position. The Department of Energy took a different position, and its contract give it the right of final approval over the terms of the new pension plan. DOE took the position that only the years of service of an employee

that were recognized by his or her employer immediately prior to consolidation should be recognized under the new pension plan. Thus, an employee such as plaintiff Carver (see Attachment B) would be entitled to one pension under the new plan, based on the relatively brief period of service for Westinghouse and the immediate predecessor employer, and another pension under the old WHC pension plan, based on his earlier employmnet at much lower levels of income. For the typical longer-service employee, the total of these two pensions would be significantly less than if all of an employee's prior service at the HNR was linked together and treated as if it had been earned under the provisions of a single final-pay pension plan.

9. Dispute as to Vesting Credits.

There was also a dispute between Westinghouse and DOE on the subject of credited prior service for the purpose of determining the level of vesting. Westinghouse took the position that for vesting purposes ERISA required recognition of all prior service (post-1965) by employees for any of the previous contractors at the HNR or any of their affiliates (subject to certain exceptions where breaks in service were involved). DOE disagreed with WHC's interpretation of the law. Ultimately, the IRS sustained Westinghouse's interpretation of ERISA in this respect.

10. Formal Approval of Plan by DOE. The subject of credited prior service for both benefit calculation and vesting purposes was a topic of continuing discussions between WHC and DOE before

and after consolidation. Partly because of these and other issues, WHC did not adopt what is considered to be a formal plan document delineating the provisions of its new pension plan until late December of 1987. This plan document was not formally approved by DOE until March of 1989.

E. INFORMATION COMMUNICATED TO PLAINTIFFS

11. Employment History. The plaintiffs in this case were employees of predecessor DOE contractors at the Hanford site at and before consolidation. Their relevant employment histories are shown on Attachment B. At the time of consolidation, each plaintiff became an employee of WHC, with no material changes in their job duties or salaries.

12. Documents Provided to Plaintiffs by WHC. At or around the time

of consolidation, WHC provided all of the potentially affected employees of all of the contractors that are listed in Paragraph No. 1 of this Stipulation, including the plaintiffs herein, with certain documents which informed them about how the conditions of their employment would be affected if they chose to become employees of WHC at the time of consolidation. Some of these documents contained information about the new proposed pension plan that was to take effect at the time of consolidation, and these documents have been included as Attachment C to this Stipulation. The documents that are contained in Attachment C are the only written information which WHC provided to these individuals at or near the time of consolidation which informed them about

their rights under the WHC pension plan.

13. Plaintiffs' Reasonable Beliefs. Based upon these documents, at the time of consolidation and for a period thereafter, plaintiffs reasonably believed that all of their prior years of service for all DOE contracotrs operating at the Hanford site from January 1, 1965 forward would be recognized under the new WHC pension plan for benefit calculation purposes.

14. Effect of Linking of Service. The effect of such "linking of service" would have been a significant increase in the amount of pension payments plaintiffs could expect to receive on retirement, as compared with either their rights under their pension plans immediately prior to consolidation or their rights under the HOEPP as ultimately interpreted and

applied by WHC. Plaintiffs claim the amount of such increase was from several hundred dollars per month to over a thousand dollars a month.

15. Off-Site Service. Certain plaintiffs, such as plaintiffs Meyers and Hagood, would testify, and would supply further evidence to support their testimony, that they understood that all of their prior service with any affiliate of a Hanford contractor would be recognized for benefit calculation purposes, regardless of whether such service had been on or off the site or had anything to do with the DOE contract. Defendant denies that any such understanding, if it existed, was reasonable.

F. TREATMENT OF SIMILARLY SITUATED EMPLOYEES

16. The Facts. During the first

several months after consolidation, and prior to the formal adoption of WHC of the document which WHC considers to be its formal pension plan document, at least three individuals who were similarly situated to the plaintiffs retired and had their prior service (post-1965) on the site linked together for the purpose of calculating their pension benefits, even though certain portions of their prior service were not recognized for this purpose by their employers prior to consolidation. That is to say, WHC treated these employees in the way in which the plaintiffs contend they should be treated.

17. Knowledge and Conduct of Plan Administrator. Mike Byrd holds the title of Manager, Pension & Savings Investments, and serves on a day-to-day

basis as the Plan Administrator of Pension and Savings for Westinghouse Hanford Company. There is a dispute whether and to what extent Mike Byrd specifically authorized this treatment of prior service in these three cases. The plaintiffs contend that Mike Byrd specifically authorized this treatment in at least one instance. The defendant contends that Mike Byrd was unaware that the three individuals in question hasd been treated in this fashion until smoe time after their retirement. However, there is no dispute that Mike Byrd became aware of the situation of these three retirees not later than early 1988, and that WHC took no action for over a year. WHC then wrote these individuals a letter stating that the original calculation of their benefits had been mistaken and that

their benefits were being reduced.

18. Knowledge of Plaintiffs. Some of the plaintiffs were aware that all prior service (post-1965) on the site had been linked for the purpose of computing these three employees' retirement benefits under the new WHC pension plan; other plaintiffs did not become aware of this fact until this lawsuit was begun.

19. Suspension of WHC Pension Payments. Prior to consolidation, some of the plaintiffs had been receiving pension payments from WHC based upon their prior employmnet with WHC. These plaintiffs contend that their WHC pension payments were based not only upon their years of service with other Westinghouse affiliates. The defendants deny this contention. At the time of consolidation, WHC ceased making these

pension payments to the plaintiffs. Furthermore, WHC sent a letter to each one of these plaintiffs at or near the time of consolidation which stated that the pension payments that the plaintiffs were receiving from WHC were being suspended because they had become re-employed by WHC. A copy of this letter is attached hereto as Attachment D.

20. Oral Statements Made to Plaintiff Meyers. In support of his claim, the plaintiff Meyers will testify that oral statements were made to him by members of WHC's management personnel in July of 1985 to the effect that all of Mr. Meyers' prior years of service with WHC would be reconsolidated by WHC for pension benefit calculation purposes whenever Mr. Meyers returned to any subsidiary of the Westinghouse

organization, including WHC, in any kind of employment capacity. Westinghouse will not offer testimony to the contrary.

G. THE PLAN DOCUMENT ADOPTED BY WHC IN DECEMBER 1987 AND EARLIER DRAFTS

21. Terms. The plan document which was adopted by WHC in December of 1987 provides that the plaintiffs and other similarly situated WHC employees are not entitled to have their prior years of service with other Hanford contractors recognized for the purpose of calculating their pension benefits unless those prior years of service were recognized for that purpose by the employer for whom the employee in question was working immediately prior to consolidation. The pertinent provisions of this plan document are included as Attachment E.

22. Information Provided to

Employees. When the above-described plan document was adopted by WHC in December of 1987, WHC distributed to its employees a summary plan description of that plan document as required by ERISA. A copy of this document is attached as Attachment F. (An earlier summary plan description, distributed at the time of consolidation, is included in Exhibit C.) Neither the final plan document itself nor any of the earlier drafts of the document were distributed to any employee who did not specifically ask for one. Very few employees made any such request, and Westinghouse does not contend that plaintiffs obtained such documents or should have done so.

H. PLAINTIFFS' KNOWLEDGE

23. At some point not later than the first half of 1988, while still

employed by Westinghouse, each of the plaintiffs learned that Westinghouse would not calculate their retirement benefits in the manner in which plaintiffs claim they ought to be calculated. That is, each plaintiff learned WHC would not give credit under its pension plan for his prior years of service at Hanford or elsewhere unless such service had been recognized for the purpose of benefit calculation by the pension plan in which he participated immediately before consolidation. WHC based its decision in this regard upon the provisions of the plan document that was adopted in December of 1987.

I. RELIANCE BY PLAINTIFFS

24. Acceptance of Employment with WHC. Plaintiffs will testify that when they accepted offers of employment with

WHC at the time of consolidation, they did so based at least in part on their understanding as to the amount of pension benefits that they would receive if they became employees of WHC. Defendant denies that this understanding was a material factor in plaintiffs' decision to accept employment with WHC in order to continue working at Hanford.

25. Out-of-Pocket Expenses. Plaintiffs did not incur any direct monetary outlay or expenses based upon their initial understanding that all of their prior site-wide and/or other years of service would be linked together for the purpose of calculating their pension benefits under WHC's new pension plan.

26. Early Retirement. During the spring and summer of 1988, WHC offered certain of its employees, including some

of the plaintiffs in this case, a "Special Voluntary Early Retirement Program" with enhanced pension benefits. Those plaintiffs who were eligible for this program will testify that they would have participated in this program is WHC had agreed to link their prior service as they contend should have been done, but that they were financially unable to participate because WHC refused to calculate their pension benefits in this manner. Westinghouse has no evidence to the contrary.

27. Retirement. Since this lawsuit was commenced, two plaintiffs have retired from WHC. These two plaintiffs were aware, prior to their retirement, that WHC would not calculate their pension benefits upon retirement in the manner in which they contend that these

benefits should have been calculated. As a result, these plaintiffs are receiving lower monthly pension benefits than they would have received if their position had been accepted.

28. Plaintiff Meyers. Meyers would testify that based upon the oral representations made to him by WHC in 1985, he did not pursue opportunities that were available to him at that time to transfer to Westinghouse subsidiaries other than WHC because he believed he would eventually be able to become re-employed by WHC at some future time, and if he did so, his prior years of service with WHC would be re-consolidated for pension benefit calculation purposes.

29. Plaintiff Hagood. During the summer and fall of 1987, WHC had an excess of employees, and therefore, it

offered a "voluntary reduction of force" program to its employees for a limited time only. This program offered certain economic incentives to those employees who would agree to voluntarily leave WHC's employment during the period of time when the program was being offered. Plaintiff Hagood claims, and WHC denies, that plaintiff Hagood agreed to participate in this program under the belief that WHC was going to give him credit for all of his years of service with Boeing as well as all of his years of service with WHC when it was calculating his pension benefits under the new WHC pension plan. Hagood's decision to participate in this program became irrevocable upon 11/16/87. Hagood would testify that, had he known that WHC was not going to give him credit for his

years of service with Boeing when it was calculating his pension benefits, he would not have participated in WHC's VROF program, and would have continued in WHC's employment. There will be conflicting testimony on these issues.

30. Plaintiff Lust. Plaintiff Leonard Lust worked for UNC at Hanford from January, 1982 to May, 1983. This period of service was too short for him to be vested in UNC's pension plan, and Lust received no credit for this service under the pension plan of Rockwell, for whom he was working immediately prior to consolidation. (See Appendix B.) When Lust retired, Westinghouse wrote him that it was going to provide him with monthly pension payments of $49.90 based on the UNC service, in addition to other amounts to which he was entitled. These payments

were never in fact made, and Westinghouse claims that the letter was issued in mistake, through a failure to recognize that Lust was never vested in his UNC pension.

J. EMOTIONAL DISTRESS

29. All of the plaintiffs contend that they have suffered emotional distress damages as a result of WHC's actions in refusing to calculate their pension benefits in the manner in which they originally understood they would be calculated. WHC denies the existence and extent of such such damages.

K. WESTINGHOUSE'S STATE OF MIND

30. Intent. Plaintiffs were not deliberately misled by WHC concerning their pension benefits. Any inaccurate or misleading information which was provided to them by WHC was the result of

uncertainty or confusion, and was provided in good faith.

31. Circumstances Surrounding Representations. In the event of trial there will be varying testimony from different Westinghouse employees involved in pension administration about the extent to which they did or did not believe, at and around the time of consolidation and at various times thereafter, that prior site-wide service would be linked for purposes of benefit calculation. There will be varying evidence about when it became clear to particular administrative employees that prior site-wide service would not be linked, with dates ranging from June, 1987 to June, 1988. There will be testimony that because of the complexity and uncertainty of these issues, the

number of employees seeking information, the inconsistencies of prior plans and record keeping, and other administrative difficulties with consolidation, the situation in pension administration was "chaotic", at least through the end of 1987. Finally, there will be testimony from Westinghouse employees that the oral advice to persons inquiring about their pension benefits and the written material in Exhibit C were intended to be conservative.

For the Plaintiffs

CRITCHLOW, WILLIAMS & SCHUSTER

S/ Alex J. Skalbania

For the Defendants

DAVIS WRIGHT TREMAINE

S/ Marvin L. Gray, Jr.

ADDITIONAL STIPULATION

The defendants have neither sought

nor received the approval of the Secretary of Labor under 29 U.S.C. §1082(c)(8) with respect to the adoption of the formal HOEPP plan document in December of 1987. It was and is the position of the defendants that the adoption of the formal HOEPP plan document did not reduce accrued benefits of any participant, and that no such approval was required.

DATED: This 26th day of June, 1990.

S/ Alex J. Skalbania
CRITCHLOW, WILLIAMS & SCHUSTER
Attorney for Plaintiffs

S/ Marvin L. Gray, Jr.
DAVIS WRIGHT TREMAINE
Attorney for Defendants

ATTACHMENT A

SUMMARY OF PLAN PROVISIONS

Old UNC Plan

Type of plan: Defined benefit, funded entirely by employer.

Vesting: No vesting until after ten years of service; 100% vested thereafter.

Benefits: A "final pay" plan. Benefits were the actuarial equivalent of a straight life annuity equal to (total years of service for UNC at the site) times (average monthly compensation during the employee's final five plan years) times (1.4% of the first $550 plus 1.8% of the excess).

Old Rockwell Plan

Type of plan: Defined benefit, but contributory through 1984. That is, until then, employees had to contribute to the plan in order to participate each

year. Employees were not eligible to participate in their first year of service.

Vesting: No vesting in first ten years, except for return of employee's contributions. 100% vested after ten years.

Benefits: A "career average" plan, with benefits based on employee's compensation in each year of participation. The percentage of such compensation (over a low base amount) rose from 2% for the early years to 2.5% in the years immediately preceding cmopensation. The benefit thus computed was paid as a five-year-certain-and-life annuity, or the actuarial equivalent.

Old Westinghouse Plan

Type of plan: Defined benefit plan, entirely funded by employer.

Vesting: Fully vested from the outset.

Benefits: A career average plan. The benefits were based on 2.25% of each year's compensation over a low base amount. The benefit thus computed was paid as a ten-year-certain-and-life annuity, or the actuarial equivalent.

ATTACHMENT B

SUMMARY OF PLAINTIFFS' EMPLOYMENT HISTORY

John R. Carver

(a) 11/67 to 4/71 - UNC
(b) 4/71 to 4/84 - WHC - laid off
(c) 4/84 to 6/87 - UNC
(d) 6/87 to date - WHC

Immediately prior to consolidation the UNC plan recognized Carver's service during period (c) only. The service during period (a) was lost because of the break-in-service rules under UNC's plan. Carver was entitled to a separate pension under the old Westinghouse plan for period (b).

Carver contends that he should receive a single pension calculated under the HOEPP formula and based on periods (a) through (d). Westinghouse contends that Carver is entitled to one pension under the old Westinghouse plan formula

for period (b) and another under the HOEPP formula for periods (c) and (d).

Donald J. Meyers

(a) 7/57 to 8/62 - Westinghouse Electric Corp. (off-site)
(b) 8/62 to 12/64 - General Electric Corp. (Hanford)
(c) 1/65 to 12/84 - Battelle and WHC
(d) 12/84 to 4/85 - laid off by WHC
(e) 4/85 to 4/86 - RHO
(f) 4/86 to 6/87 - RHO
(g) 6/87 to date - WHC

Immediately prior to consolidation the RHO plan recognized Meyers' service during peirod (f) only. Period (e) was not recognized because under the old Rockwell plan employees were not participants in their first year of employment. In addition Meyers was entitled to a separate pension under the old Westinghouse plan for period (c), and to another pension under the Westinghouse corporate plan for period (a).

Meyers contends that he is entitled to a single pension calculated under the HOEPP formula based on periods (a) through (g), except for period (d) when he was out of work because of an involuntary layoff. Westinghouse contends that Meyers is entitled to pensions under the corporate and old Westinghouse plan formulas for periods (a) and (c), and another pension calculated under the HOEPP formula for periods (f) and (g).

Albert E. Sampson

(a) 1/65 to 11/79 - RHO and predecessor contractors
(b) 11/79 to 10/81 - UNC
(c) 10/81 to 2/83 - employed off-site in unrelated work
(d) 3/83 to 6/87 - UNC
(e) 6/87 to date - WHC

Immediately prior to consolidation, UNC recognized Sampson's service for periods (b) and (d) only. He was also

fully vested in a Rockwell pension for period (a).

Sampson contends that he is entitled to a single pension calculated under the HOEPP formula based on periods (a), (b), (d), and (e). Westinghouse contends that Sampson is entitled to a pension under the old Rockwell plan formula for period (a), and another pension under the HOEPP formula for periods (b), (d), and (e).

William E. McClung

(a) 1/65 to 12/81 - WHC and Battelle
(b) 12/81 to 10/82 - work for unrelated employer
(c) 10/82 to 6/87 - UNC
(d) 6/87 to 12/88 - WHC
(e) 12/88 to date - work for unrelated employer

Immediately prior to consolidation, UNC recognized McClung's service for period (c) only. He was also fully vested in the old Westinghouse plan for period (a).

McClung contends that he is entitled to a single pension calculated under the HOEPP formula for periods (a), (c), and (d). Westinghouse contends that McClung is entitled to one pension under the old Westinghouse plan formula for period (a) and another calculated under the HOEPP formula for periods (c) and (d).

Martin L. Hagood

(a) 3/66 to 7/73 - Boeing Co. (off-site at Kennedy Space Center)
(b) 7/73 to 5/76 - Boeing Co. (off-site at Seattle)
(c) 5/76 to 8/76 - laid off
(d) 8/76 to 11/76 - Boeing co. (off-site at Seattle)
(e) 11/76 to 1/88 - WHC (except for four months in 1979)

Immediately prior to consolidation Westinghouse recognized Hagood's service for period (e) only. He was also fully vested in a Boeing pension for periods (a), (b), and (d).

Hagood contends that he is entitled to a single pension calculated under the HOEPP formula for periods (a), (b), (d), and (e). Westinghouse contends that Hagood is entitled to a pension under the HOEPP formula for period (e) as well as his Boeing pension for periods (a), (b), and (d).

Leonard F. Lust

(a) 1/65 to 12/81 - WHC and Battelle
(b) 1/82 to 5/83 - UNC
(c) 5/83 to 7/84 - unrelated work off-site
(d) 7/84 to 7/85 - RHO
(e) 7/85 to 6/87 - RHO
(f) 6/87 to 10/88 - WHC
(g) 10/88 to date - retired

Immediately prior to consolidation Rockwell recognized Lust's service for period (e) only. Period (d) was not included because under the old Rockwell plan, employees were not participants in their first year of employment. In

addition, Lust was entitled to a pension under the old Westinghouse plan for period (a). The UNC service in period (b) was lost because Lust did not fulfill the vesting requirements.

Lust contends that he is entitled to a pension calculated under the HOEPP formula for the periods (a), (b), and (d) through (f). Westinghouse contends that Lust is entitled to a pension under the HOEPP formula for periods (e) and (f), in addition to his pension under the old Westinghouse plan for period (a).

ATTACHMENT C

PENSION PLAN SERVICE CREDITS FOR NON-BARGAINING UNIT EMPLOYEES

Of all the questions employees have been asking on our Consolidation Hotline, questions about their pension plan credits are among the most frequently asked. Many have asked whether any of their "old" pension service will be restored when Westinghouse and Boeing take over the contract on June 29.

The answer to that question is not simple. In the April 17 edition of Consolidation News, we discussed the "continuity of service" date used for vacation purposes. In this summary, we will review pension plan service credits only.

There are two types of pension plan service -- one for pension benefits and another for vesting, and they are

determined under different rules. Service for pension benefit purposes is calculated in years, months and days. But vesting service is applied in full years using the so-called "1,000 Hour Rule," which provides that in any plan year in which you are credited with at least 1,000 hours of service, you have one year of service for vesting purposes.

Many employees have service with more than one of the contractors involved in the O&E consolidation. And some also may have service with parent companies prior to transferring to Hanford. Such service may count for vesting and/or benefit purposes -- whether or not it counts for vacation purposes.

First of all, the new WHC/BCSR Pension Plan will accept the same service recognized by your "predecessor employer"

as of June 28. Additionally, those who have prior service with one or more of the other contractors involved in the O&E consolidation may also have all or a part of such service restored. These determinations will be made in accordance with the Employee Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity Act of 1984 (REA). Briefly, the guidelines for restoring pension plan service are:

> Any employee who is fully or partially vested in another pension plan affected by the consolidation shall have the benefits and vesting service from that plan retained in the new WHC/BCSR plan, effective June 29.
>
> For service breaks after 1984, prior accrued pension benefit and vesting service will be restored if the period of absence did not exceed the length of prior service or five years, whichever is greater.
>
> For service breaks after 1974

> but before 1985, prior service shall be restored if the absence did not exceed the length of prior service or one year, whichever is greater.
>
> Service breaks prior to 1974 will be handled under the provisions of the plan in effect at that time.

To ensure that you receive all of the service credits to which you are entitled, we are including a questionnaire in this benefits enrollment package. Please complete and return the questionnaire if you have prior service with any of the contractors or parent companies of the contractors involved in the O&E consolidation <u>that has not been credited by your present employer</u>. Your individual case will be reviewed and you will be notified if any service adjustment is to be made. While it may take weeks or months to complete all of these individual reviews, any pension

service adjustments will be effective June 29 (retroactively, if necessary).

RESTORATION OF SERVICE QUESTIONNAIRE

When you transfer to Westinghouse Hanford Company or BCS Richland effective June 29, you will take with you the service recognized by your "predecessor employer" as of June 28. In addition, some of you may be eligible to have some prior service restored.

If you are transferring from RHO or UNC and have any prior service with WHC, BCSR, Westinghouse Electric Corporation, or the Boeing Company which has not already been credited by your present employer, such service will be restored for vacation purposes.

If you had prior service with BCSR, RHO, UNC, WHC or their parent Companies, which has not been credited by your

present employer for pension plan purposes, such service may be restored depending on the specific circumstances in each case.

If you have prior service which you wish to have considered for restoration, for either vacation or pension plan purposes, please complete the questionnaire below and return in the envelope provided.

Name: _____

Current Payroll No. _____

Social Security No. _____

Work Phone _____

Current Employer _____

Work Location _____

PRIOR SERVICE: (Other than that recognized by current employer)

Company _____

Division/Subsidiary _____

Dates of Service: From_____ to _____

Location _____

If name has changed due to marriage or other reasons, please indicate name under which service was accrued _____

PENSION PLAN
for
NON-BARGAINING UNIT EMPLOYEES
of
WHC/BCSR

June 29, 1987

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INTRODUCTION

This brochure contains the highlights of the revised multiple-employer pension plan effective June 29, 1987. You will receive a more detailed description of the plan in a few months. Since this brochure is only a summary of the formal

plan document that controls operation of the pension plan, any questions concerning the specific interpretation or administration of the plan will be resolved based on actual provisions of the formal plan document.

ELIGIBILITY

Regular full-time or part-time non-bargaining unit employees participating in their current employer's pension plan on June 28, 1987, become participants in this plan on June 29, 1987. Temporary and hourly employees are not eligible to participate. New employees or those not presently participating shall become eligible upon the later of June 29, 1987 or completion of one year of service.

ENROLLMENT

The initial enrollment date will be June 29, 1987.

Thereafter, an employee who has complied with the eligibility requirements listed above will be enrolled either January 1 or July 1 of each calendar year.

SERVICE

If you become a participant of the plan on June 29, 1987, you will receive credit for prior service in accordance with your prior plan's provisions; however, no credit will be given for service before January 1, 1965.

Service for determination of eligibility and accrued benefits begins on your employment commencement date.

Generally, you will earn service for determining your benefit amount until severance from service occurs. Credited service is capped at 40 years and no credit will be given for service after age 65.

If you become totally and permanently disabled, as determined under the Westinghouse Hanford Disability Plan, you will continue to earn credited service during your period of disability.

Your Normal Retirement Benefit - The Basic Formula

The basic formula for calculating your monthly retirement benefit is:

> 1.6 percent times your "average monthly base pay" times your pension credited service. Your "average monthly base pay" is the average of your highest sixty consecutive months of base pay as an eligible employee.

Example:

1.6% x $2,500 (60 month average) x 30 years = $1,200/month

1.6% x $3,500 (60 month average) x 30 years = $1,680/month

1.6% x $4,500 (60 month average) x 30 years = $2,160/month

Pension payments are in addition to Social Security Benefits (if eligible).

Types Of Retirement

*Normal Retirement

Normal retirement occurs at age 65 and begins on the first day of the month following the month in which you reach 65. If you reach age 65 on the first day of the month, your normal retirement date will be on that day.

Employees who reach age 65 prior to June 29, 1987, will have their retirement benefit computed on the basis of the plan in existence prior to June 29, 1987.

*Early Retirement

Early retirement may be elected at any time after reaching age 55 with at least ten years of vesting service. Early retirement benefits will be reduced by one-half of one percent per month.

The early retirement reduction will not apply if you leave employment by retiring

after reaching age 62 with at least ten years of vesting service.

*Grandfather Provision

On June 29, 1987, those employees who are at least 55 years of age or, who have age and years of pension credited service equaling at least 65 will be "grandfathered" and will receive a retirement benefit computed on the basis of either (1) the employees' plan in existence prior to June 29, 1987, or (2) the new pension plan, whichever is greater. All provisions of the plan providing the greater benefit, including eligibility for early retirement, early retirement adjustments, death benefits, and optional forms of benefit payments will apply.

*Deferred Retirement

You may defer your retirement beyond the

normal retirement age of 65. If you continue working after age 65, your pension benefit must commence the later of (1) your actual retirement; or, (2) your reaching age 70 1/2.

*Your Benefit If You Leave Before Retirement Age

If you are vested when you leave employment, you may at a later date claim the vested benefit you have earned. You may do this when you reach age 65. You may also claim your benefit at any time after reaching age 55. In which case the early retirement reduction factor will be applied.

If you should leave the company before retiring and are vested, you will be provided with a statement of your accrued benefits. You should contact the company approximately ninety days prior to the

date you wish benefits to begin.

*Vesting

A participant's accrued benefit shall vest in accordance with the following schedule:

Years of Service	Vesting Percentage
Less than 5	0%
5	50%
6	60%
7	70%
8	80%
9	90%
10	100%

You may be entitled to credit for service with other contractors on site. For details, contact the plan administrator.

*Pension Payments

Pension payments will begin effective the first day of the month following your retirement date. The normal retirement allowance will be payable in the form of a life and ten year certain annuity.

Optional forms of benefit payments

include:

1. A life annuity;

2. A life annuity with sixty months guaranteed;

3. A one-hundred percent, seventy-five percent, or fifty percent joint and survivor annuity;

4. A combination joint and survivor annuity and five or ten year certain annuity.

Options 3 and 4 above are available only to married participants. If you are married, the fifty percent joint and survivor option will be used unless you and your spouse elect in writing to the contrary.

Lump sum distributions will be made for an accrued benefit of less than $3,500.

*Death Benefits

If you should die while you are an active

plan participant, your surviving spouse, if you are married, or your named beneficiary, if you are not married, could be eligible for a monthly benefit, or could elect a lump sum distribution. This survivor benefit could also be available if you terminate employment and die before retirement benefit payments begin.

Any questions concerning your plan should be directed to your Benefits Office.

CONSOLIDATED NEWS

Westinghouse Hanford Company

Together We Count

Volume No. 9 May 29, 1987

NEW PENSION PLAN FOR NON-BARGAINING UNIT EMPLOYEES COMING SOON IN BENEFITS ENROLLMENT PACKAGES

In just a matter of days, all employees who are expected to transfer to the new Operations and Engineering organization will receive a benefits enrollment package. For non-bargaining unit employees, these packages will include a comprehensive summary of the new WHC/BCSR Pension Plan and an explanation of how pension service credits will be determined. Brochures that describe the new Investment and Insurance Plans also will be included in the packages along with the appropriate enrollment cards and instructions for completing and returning

them.

Enrollment packages for bargaining unit employees will be very similar with the exception of the Investment and Pension Plan enrollment materials which were completed earlier this year. Therefore, enrollment cards for the Investment and Pension Plans will not be included in the packages for bargaining unit employees. Enrollment materials for the new Insurance Plan will be included. Bargaining unit employees who have questions about the Insurance Plan are encouraged to call our Consolidation Hotline (6-7727), or call one of their current employer's benefits specialists: Bob Bryant WHC/6-7620), Wendy Detrick (BCSR/6-1088), Joel Sorenson (RHO/3-1034), and Steve Miller (UNC/6-7190).

In addition to the benefits enrollment

materials that all transferring employees will get soon, everyone's package also will include a new Patent Agreement and Conflict of Interest form which must be completed and returned to the same location you return your benefit enrollment cards.

Over the past four weeks, we've present the highlights of the new benefits plans for non-bargaining unit employees in Consolidation News. But if it's details you want, you'll get that in the enrollment packages and in sitewide information meetings. Because our hardworking Benefits Task Team understands that the best communication is often face-to-face, they've planned an ambitious schedule of information meetings on the new Investment and Pension Plans during the next two weeks.

All non-bargaining unit employees are encouraged to attend one of the sessions conducted by the Benefits specialists within their current organizations. In addition to a short presentation, there will be a question-and-answer period during each meeting. (A schedule of these information meetings will be included in the enrollment packages.)

An Information Source For Employees
of BCS Richland, Inc., Rockwell Hanford
Operations, UNC Nuclear Industries, Inc.
and Westinghouse Hanford Company
Published by Rockwell Internal
Communications and
Westinghouse Communication Services.

If, for any reason, you can't attend one of these meetings, don't forget that our Consolidation Hotline (6-7727) is another good way to get answers to your questions. The employee information line is manned by our Human Resources staff from 8:00 a.m. - 4:30 p.m., Monday

through Friday.

With contract turnover just a month away, you will need to complete your enrollment cards immediately for any of these benefits. Because your enrollment cards and other forms must be returned by June 15, it is important for you to review the materials as soon as you receive your packages. (If you do not receive a package by Friday, June 5, please contact your current employer's Benefits staff.)

. . . . . .

Looking ahead . . .

* Benefits enrollment packages distributed	By June 5
* Investment/Pension Plan Information meetins scheduled	June 3 - 9
* All benefits enrollment cards and forms due	June 15

. . . . . .

BECAUSE YOU ASKED:

* Benefits coverage for employees who retire before June 29 will continue in accordance with the provisions of their current employer's benefits plans.

* Employees who retire after June 29 will be covered under the provisions of the new WHC/BCSR benefits plan.

CONSOLIDATED NEWS

Westinghouse Hanford Company

Together We Count

Volume No. 3 March 20, 1987

WESTINGHOUSE JOB OFFERS TO BE MADE IN LAYERS

If you've heard that some people are getting job offers from Westinghouse and you don't happen to be one of them, don't worry. The offers aren't going out at the same time -- they will be made in layers, starting from the top down.

On March 2, Westinghouse delivered to DOE the first draft of the new organizational plan which identified the positions, but not the individuals who will hold them. Westinghouse senior managers are now in the process of selecting people for the management positions reporting directly to them.

Level by level, this selection

process will continue until all of the management teams and the individuals within their groups have been identified. All management assignments and rosters for the new organization are expected to be completed by May 1. This target date is important because it coincides with budget planning for fiscal year 1988.

In making their personnel selections, Westinghouse managers are considering the specific requirements for each job and reviewing the potential candidates. They are gathering feedback from the individuals' current managers, reviewing personnel records, and to the extent possible, personally interviewing potential candidates.

While managers will be receiving offer letters over the next two months, it is likely that non-management

91-1905 (3)

Supreme Court, U.S.
FILED
MAR 16 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

JOHN CARVER, AL SAMPSON,
BILL McCLUNG, DONALD J. MEYERS,
and MARTIN L. HAGOOD

Petitioners

v.

WESTINGHOUSE HANFORD COMPANY,
a corporation;
HANFORD OPERATIONS AND ENGINEERING PLAN

Respondents.

VOLUME 2 OF 3
APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
UNITED STATES

CRITCHLOW, WILLIAMS, SCHUSTER,
MALONE & SKALBANIA
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David E. Williams, WSBA #04093
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Richland, Washington 99352
Phone: (509) 946-6181

employees will be notified of their assignments through employment confirmation notices. The Westinghouse Human Resources staff is preparing to issue these notices with one of our May paychecks.

The employment confirmation notices will inform employees of their work assignments and ask whether they wish to accept or decline employment with Westinghouse Hanford. In addition, employees will be asked to sign a release allowing their personnel records to be transferred from their current employer to Westinghouse. At the time employees receive their employment confirmations from Westinghouse, they also will be given new Conflict of Interest and Patent/Information Disclosure agreements to sign and return to Human Resources.

One last reminder: personnel assignments are being made in layers. Yours is coming too -- by the end of May at the latest.

An Information Source For Employees of BCS Richland, Inc., Rockwell Hanford Operations, UNC Nuclear Industries, Inc. and Westinghouse Hanford Company
Published by Rockwell Internal Communications and
Westinghouse Communication Services.

JUNE 29 TO BE TAKEOVER DATE

June 29th has now been designated as the effective contract takeover date -- the date that Westinghouse assumes responsibility for all operations currently being managed by the present Operations and Engineering contractors. This date will replace the July 1 date because it coincides with the fiscal month.

HANFORD TO BE IDENTIFIED AS NEW WESTINGHOUSE BUSINESS UNIT

It's official! Westinghouse's operations here have been designated as the Hanford Business Unit, directed by Dr. W. M. Jacobi.

Under Westinghouse's organizational structure, business units are autonomous businesses, comprising similar operations that focus on a single segment of the business. This structuring ensures more effective strategic planning and resource allocation.

At the time Westinghouse was selected to manage the consolidated Hanford contract, Dr. Jacobi was general manager of the Advanced Power Systems Divisions. APSD also was a business unit, comprised of two commercial divisions and five government contractor operations, including Westinghouse Hanford.

With Westinghouse's selection for the O&E contract here, it was announced that Dr. Jacobi will head the new corporate business unit. His APSD organization was disbanded, and the divisions that had reported to him were realigned with other Westinghouse business units. Dr. Jacobi, a vice president of Westinghouse Electric Corporation, becomes president of the Westinghouse Hanford Company on the June 29 contract takeover date.

PAUL MATTHEWS ANSWERS YOUR QUESTIONS ABOUT CONSOLIDATION

The following employee questions are among those most frequently asked of Paul Matthews and the Westinghouse Human Resources staff. If you have additional questions or concerns, you may wish to call the Consolidation Hotline at 6-7727.

Q. Where will the BWIP organization

fall within Westinghouse?

A. BWIP will become our Civilian Waste Management Division. We're delighted that Dr. Clark Gibbs, who is currently Rockwell's BWIP director, will head that division for us.

Q. I've transferred from another Rockwell Division. Will my time be counted as it is now with RHO?

A. Hanford employees, whether they work for Rockwell, Westinghouse or another contractor, won't lose their service credit under provisions of their individual pension plans. Under the new contract, we are proposing to honor the service that is recognized by the current employer for pension vesting and vacation eligibility. In which case, former employees of Westinghouse and Boeing who now work for another contractor are

likely to get credit for their prior service if their current employer has accepted that time. This issue should be resolved within the next few months.

Q. With the takeover, will employees gain total time accumulated at Hanford even though that time may have been with several different contractors?

A. Probably not. Again, we plan to honor the service credits that are recognized by your current employer.

Q. I transferred from another Rockwell division to RHO 1-1/2 years ago and was eligible for the 85-point system at that time. Will I lose it?

A. It would be best for employees to contact their own benefits administrators for information on their current pension, stock and savings plans because these are tailored to individual

corporate programs. Members of our Personnel staff can answer questions about Westinghouse's program, but we are unfamiliar with those of the other contractors.

Q. What's my status between now and takeover?

A. Between now and our target takeover date of June 29, current employees will remain on the payroll of Westinghouse Hanford, BCS Richland, Rockwell Hanford or UNC Nuclear Industries.

Q. What about the drug/alcohol testing -- do you expect any change in this policy?

A. Like most Hanford contractors, Westinghouse currently requires applicants for employment to undergo a urinalysis for drugs and alcohol. We

expect that policy to continue. There has been no decision to extend drug and alcohol testing to current employees. Should there be any change in this policy, we would immediately communicate that to all employees.

ATTACHMENT D

WESTINGHOUSE HANFORD COMPANY
P. O. Box 1970
Richland, WA 99352

July 31, 1987

Mr. John R. Carver
P. O. Box 104
Richland, WA 99352

This letter will confirm information concerning the pension benefit you were receiving from Westinghouse Hanford Company (WHC) prior to consolidation. As provided in Sections 1.7(1) and 2.8 of the WHC Pension Plan text, and Section 4.8 of the "new" Operations and Engineering Pension Plan, this pension benefit was interrupted when you returned to the employ of WHC effective June 29, 1987.

Upon subsequent retirement, your pension benefit will be recalculated under the

provisions of the revised WHC/BCSR Operations and Engineering Pension Plan which became effective June 29, 1987. As provided under the "Grandfather" clause, you will receive the greater of the benefits calculated under the "old" Plan or the "new" Plan.

Presently, no pension benefits accrue for individuals who continue in employment beyond age 65. However, this provision will change effective January 1, 1988. After that date, employees over age 65 will accrue pension benefits on the same basis as other active employees.

If you have additional questions concerning your status or benefits, please contact Employee Benefits on 376-7190 or 376-6101.

S/ G. L. Clogston
Manager

Compensation and Benefits

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al, and MARTIN L. HAGOOD,	)	No. C-88-582-AAM C-88-391-AAM
Plaintiffs,	)	O R D E R
vs.	)	
WESTINGHOUSE HANFORD COMPANY, et al,	)	
Defendants.	)	

On Thursday, July 5, 1990 at 11:00 a.m. in Yakima, Washington, the court heard the parties Cross-Motions for Summary Judgment. Alex J. Skalbania, Critchlow, Williams & Schuster, represented plaintiffs. Marvin L. Gray, Davis Wright Tremaine, appeared on behalf of defendants. After reviewing the cross-motions, including the memoranda in support and the entire court file, the court being fully informed in the above-

captioned matter, IT IS HEREBY ORDERED that plaintiffs' Cross-Motion for Summary Judgment be DENIED.

IT IS FURTHER ORDERED that defendants' Cross-Motion for Summary Judgment is GRANTED.

BACKGROUND FACTS

While the court hereby incorporates by reference the parties' lengthy and detailed fact stipulation (Ct. Rec. 35), a somewhat brief restatement of the facts shall also be recited in this order. The basic issue of this lawsuit involves a dispute as to whether plaintiffs are entitled to have certain periods of their prior employment with other employers restored so as to be recognized in the calculation of their pension benefits.

In 1986, the Department of Energy (DOE) decided to consolidate the primary

responsibility for maintaining day-to-day operation of the Hanford Nuclear Reservation (HNR) in the hands of one private contractor. Westinghouse Hanford Company (WHC, a defendant herein) was selected as the consolidated contractor and scheduled to accomplish the consolidation by June 29, 1987.

Among the many administrative matters that had to be resolved in connection with consolidation was an array of issues regarding pension plans. Prior to consolidation, UNC Nuclear Industries, Inc. (UNC), Rockwell Hanford Operations (RHO), Pacific Northwest Laboratories (Battelle), Boeing Computer Services Richland Operations (BCSR), and Westinghouse Hanford Co. (WHC) each operated its own pension plan for its own employees at the HNR. Because it was

anticipated that the large majority of the employees at the Hanford Site would become employees of the consolidated contractor at the time of the consolidation, it was decided prior to consolidation that a new site-wide pension plan should be adopted at the time of consolidation, into which the assets of the previous pension plans on the site would be merged.

The new site-wide pension plan was envisioned by WHC as a final pay plan with a graduated vesting schedule. Subject to certain exceptions and qualifications, the monthly retirement benefit (based upon a 10 year certain and life annuity) would be 1.6% of average monthly compensation over the "high five" compensation years, times the number of years (or fractional years) of employment

that were recognized under the plan. With similar exceptions and qualifications, employees were 60% vested after five years of service, rising to 100% after ten years of service.

One issue that needed to be resolved by WHC, and which has become the issue of this lawsuit, was the manner in which its employees, both old and new, would receive recognition under the provisions of the new pension plan for the years of service that they had previously accumulated with WHC and/or its affiliates, and/or with the other contractors at the HNR and/or with their affiliates.

Initially, WHC took the position that for the purpose of calculating an employee's benefits under the new site-wide pension plan, the plan should

recognize all of an employee's prior years of service (post 1965) at the HNR with WHC, RHO, BCSR, WHC and Battelle. The DOE, whose contract gave it the right of final approval over the terms of the new pension plan, took the position that only the years of service of an employee that were recognized by his or her employer immediately prior to consolidation should be recognized under the new pension plan. DOE and WHC also initially disputed the amount of prior service to be credited for determining the level of vesting.

The plaintiffs in this case were employees of predecessor DOE contractors at the Hanford site at and before consolidation. At the time of consolidation, each plaintiff became an employee of WHC with no material changes

in their job duties or salaries.

At or around the time of consolidation, WHC provided all of the potentially affected employees of all of the contractors, including the plaintiffs, with certain documents which informed them about how the conditions of their employment would be affected if they chose to become employees of WHC at the time of consolidation. Some of these documents contained information about the new proposed pension plan that was to take effect at the time of consolidation (Attachment C to Stipulation). The documents which comprise Attachment C are (1) three issues of a regularly published newsletter designed to keep employees informed about the consolidation, (2) a questionnaire regarding linking of prior service, and

(3) a booklet summarizing the highlights of the new consolidated pension plan. These documents which comprise Attachment C are the only written information which WHC provided to these individuals at or near the time of consolidation which informed them about their rights under the WHC pension plan.

The subject of credited prior service for both benefit calculation and vesting purposes was a topic of continuing discussions between WHC and DOE before and after the consolidation. Because of these and other issues, WHC did not adopt a formal written pension plan document until December, 1987. This formal plan document was not approved by DOE until March of 1989. The formal plan document provides that the plaintiffs and other similarly situated WHC employees

are not entitled to have their prior years of service with other Hanford contractors recognized for the purposes of calculating pension benefits unless those prior years of service were recognized for that purpose by the employer for whom the employee in question was working immediately prior to consolidation.

After accepting employment with WHC, and no later than the first half of 1988, while still employed by WHC, each of the plaintiffs learned that WHC would not calculate their retirement benefits in the manner the plaintiffs claim they ought to be calculated. That is, each plaintiff learned WHC would not give credit under its pension plan for his prior years of service at Hanford or elsewhere unless such service had been

recognized for the purpose of benefit calculation by the pension plan in which he participated immediately before consolidation.

Subsequently, plaintiffs John Carver, Al Sampson, Herbert Barrus, Bill McClung, Leonard Lust and Donald Meyers filed an action in this court under cause number C-88-391-RJM. Plaintiff Martin Hagood filed his action in state court and defendant Westinghouse removed the action to this court under cause number C-88-582-AAM. Jurisdiction is predicated upon 28 USC §1331 (federal question) because the claims arise under federal statute, 29 USC §1001 et. seq. (ERISA). Both the ERISA plan and the plan administrator have been named as defendants. The actions were consolidated and are now before the court

on the parties' cross-motions for summary judgment.

DISCUSSION

The plaintiffs have asserted three separate theories of recovery:

> (1) Adoption of the formal Hanford Operations and Engineering Pension Plan (HOEPP) in December, 1987 violated ERISA because, if effective, it would have resulted in an impermissible decrease in the amount of accrued benefits that had been earned as of December, 1987, and therefore it constitutes nothing but an ineffective amendment. Essentially, plaintiffs contend that Attachment C to the Stipulation is the governing ERISA plan in this case and that the HOEPP formal plan document adopted in December, 1987 is merely a failed amendment;
>
> (2) because of certain conduct and information that was conveyed to the plaintiffs, the administrator of the WHC pension plan should be estopped from administering the plan in a manner that fails to give them credit under the provisions of the plan for

benefit calculation purposes for the years of service for which the plaintiffs contend that they are entitled to receive credit; and

(3) provisions of the HOEPP, as interpreted and applied by the administrative committee, violate the provisions of 29 USC §1060(b). (asserted for the first time in plaintiffs' response to defendants' motion for summary judgment).

1. Background on ERISA

ERISA is a remedial statute designed to protect the interests of employees in pension and welfare plans and to protect employers from conflicting and inconsistent state and local regulation of such plans. See Shaw v. Delta Airlines, 463 U.S. 85 (1983). The former purpose is achieved through requirements for reporting, disclosure, participation rights, vesting or rights to benefits, funding, fiduciary responsibilities, and claims procedures. See 29 USC §§1021-

1145. The latter purpose is achieved through the preemption of all state laws relating to employee pension and welfare benefit plans. See 29 USC §1144.

ERISA creates federal causes of action for recovery of benefits due under pension and welfare plans, see 29 USC §1132(a)(1)(B), and for breach of fiduciary duty by plan fiduciaries, see 29 USC §§1109 and 1132(a)(2). ERISA, unfortunately, does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501 (9th Cir., 1985). Instead, Congress intended for the courts, borrowing from state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal

common law to govern ERISA suits. Id.

2. Summary Judgment Standard

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). On a motion for summary judgment, this court must determine if a fair-minded jury could return a verdict for the nonmoving party. Id. at 252. The party seeking summary judgment must show that no genuine issues of material fact exists and that he is entitled to judgment as a matter of law by "pointing out" to the ocurt that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has carried

its burden under Rule 56, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. Celotex, 477 U.S. at 324. The nonmoving party may do this by use of affidavits (including his own), depositions, answers to interrogatories, and admissions. Id. If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita, 475 U.S. at 587. However, all inferences drawn from the underlying facts must be viewed in the light most favorable to the party

opposing the motion. Id.

Based upon the parties' detailed fact stipulation, this court now finds that, while issues of fact remain, they are not material and thus, do not prevent resolution of this matter by summary means.

3. The Plan

The first issue that the court must resolve is to determine whether, as plaintiffs contend, a written summary of the plan document, questionnaire, and several newsletters distributed in 1987 are the written documents which comprise the governing pension plan (Attachment C to the Stipulation). In response, defendants claim that the controlling written document is the HOEPP formal plan document which was adopted by WHC in December, 1987 (Attachment E to the

Stipulation). In reply, plaintiffs argue that the HOEPP formal plan document is merely an ineffective amendment because it reduces the amount of benefits accrued under the documents contained in Attachment C, in violation of 29 USC §1054(g)(1). Plaintiffs' first claim is premised upon two contentions: (1) that the documents in Attachment C to the Stipulation constitute the governing written instrument of the ERISA plan and (2) that these documents affirmatively establish that all prior on-site service shall be restored and linked together for calculation of pension benefits. As set forth below, both of these contentions are erroneous.

Under ERISA,

> The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was

> heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --
>
> > (i) provides retirement income to employees, or
> >
> > (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . .

29 USC §1002(2)(A). The Ninth Circuit has recognized that the existence of a written instrument is not a prerequisite to ERISA coverage, Scott, 754 F.2d 1503, and has thus defined "plan, fund, or program" quite broadly. "'Once it is determined that ERISA covers a plan, the Act's fiduciary and reporting procedures do require the plan to be established pursuant to a written instrument,

(citations omitted), but clearly these are only the responsibilities of administrators and fiduciaries of plans covered by ERISA and are not prerequisites to coverage under the Act.'" Id. at 1504, quoting Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir., 1982) (en banc). The Donovan court found that a "'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Donovan, 688 F.2d 1373. It must be noted, however, that the Donovan court decided only that jurisdiction under ERISA existed. Plaintiffs' theory is based upon the argument that employee benefit plans that

are subject to ERISA can be established and governed by written instruments that do not rise to the level of a formal plan document.

Plaintiffs reliance upon Donovan appears misplaced because the defendants have never denied the existence of a pension plan nor have they contended that ERISA does not apply. While it cannot be disputed that there is no requirement of a formal, written plan in either ERISA's coverage section, 29 USC §1003(a) or its definition section, 29 USC §1002(1), it is also clear that once it is determined ERISA covers a plan, 29 USC §§1022 and 1102 require the plan to be established pursuant to a written instrument. Simply put, ERISA does not condition a plan's initial validity on whether it is in writing. More importantly, it is not the

plan's initial validity which is at issue in this case.

The cases upon which plaintiffs base their argument (Scott, 754 F.2d 1499; Donovan, 688 F.2d 1367; Robbins v. Lynch, 836 F.2d 330 (7th Cir., 1988)) involve circumstances in which the employers did not promulgate formal written employee benefit plans. In these cases it was necessary for the courts to resort to informal documents and evidence of pattern and practice to determine whether an employee benefit plan even existed and thus, was governed by ERISA. This court, however, is not obliged to resort to reliance upon such informal material or the surrounding circumstances because (1) ERISA coverage has never been denied and (2) a formal written pension plan exists - the Hanford Operations and Engineering

Pension Plan. (Attachment E to Stipulation).

ERISA mandates that pension plans conform to certain requirements. Specifically, under 29 USC §1102, every employee benefit plan shall provide for a named fiduciary who shall have authority to operate and administer the plan. The written plan shall also provide "a procedure for establishing and carrying out a funding policy," "describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan," "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan," and "specify the basis on which payments are made to and from the plan." 29 USC §1102(b).

It cannot be disputed that none of the documents in Attachment C, either separately or as a whole, satisfy the requirements of section 1102(b). As set forth in the introduction to the seven-page booklet entitled "Pension Plan for Non-Bargaining Unit Employees of WHC/BCSR" (contained in Attachment C):

> "This brochure contains the highlights of the revised multiple-employer pension plan effective June 29, 1987. You will receive a more detailed description of the plan in a few months. Since this brochure is only a summary of the formal plan document that controls operation of the pension plan, any questions concerning the specific interpretation or administration of the plan will be resolved based on actual provisions of the formal plan document."

Attachment C. Unlike plaintiffs would have the defendants and the court believe, this document is exactly what it

purports to be, "highlights of the revised multiple-employer pension plan effective June 29, 1987." The booklet specifically cautions that it is a summary of the formal plan document. It does not purport to be nor is it a written instrument in compliance with 29 USC §1102. Likewise, the other documents which comprise attachment C are precisely what they purport to be (three issues of a regularly published newsletter designed to keep employees informed about the consolidation and a questionnaire regarding linking of prior service) and not an ERISA plan.

Prior to consolidation, each of the on-site contractors (UNC, RHO, BCSR, and WHC) operated its own pension plan, governed by formal written instruments in compliance with ERISA. On the effective

date of consolidation, a multiple employer pension plan was established and the assets of all the predecessor plans were merged into the "new plan." The documents contained in Attachment C were disseminated prior to and at the time of consolidation in an effort to keep employees apprised of matters relating to the consolidation, including how their pension benefits would be effected. The plain language of the documents confirms their purpose. Any contention that these informal written communications (three newsletters, a questionnaire and a summary booklet) somehow constitute a formal written instrument which governs administration of the consolidated pension plan is erroneous. This is especially true in light of the fact that the predecessor plans were each

separately governed for years by formal written instruments.

Because the Attachment C documents are not the governing written instrument utilized to administer the consolidated pension plan, plaintiffs accrued no benefits under such documents. As a result, the rule against reduction of benefits does not apply (under 29 USC §1054(g)(1) the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8)). Accordingly, plaintiffs' argument, that the HOEPP formal written document adopted in December of 1987 is merely an ineffective amendment to Attachment C because it reduced benefits accrued under the plan, must fail.

However, assuming arguendo, that the documents in Attachment C constitute the written instrument governing the consolidated pension plan, this court finds that they are not inconsistent with the formal HOEPP document adopted in December, 1987 with respect to the issue of linkage of service for calculation of pension benefits. Defendants assert that plaintiffs' motion for summary judgment rests on the contention that the documents in Attachment C affirmatively declare that prior service with all contractors would be restored for pension benefit calculation purposes. Defendants claim that such a contention is erroneous.

In the months preceding the consolidation, WHC and Rockwell published and distributed to UNC, BCS, Rockwell and

WHC employees, the Consolidated News, an information source regarding all aspects of the consolidation, which included information regarding pension plans. The Consolidated News dated March 20, 1987 includes the following questions and answers:

> "Q. I've transferred from another Rockwell Division. Will my time be counted as it is now with RHO?
>
> A. Hanford employees, whether they work for Rockwell, Westinghouse or another contractor, won't lose their service credit under provisions of their individual pension plans. Under the new contract, we are proposing to honor the service that is recognized by the current employer for pension vesting and vacation eligibility. In which case, former employees of Westinghouse and Boeing who now work for another contractor are likely to get credit for their prior service if their current employer has accepted that time. This issue should be resolved within the next few months.

Q. With the takeover, will employees gain total time accumulated at Hanford even though that time may have been with several different contractors?

A. Probably not. Again, we plan to honor the service credits that are recognized by your current employer.

Q. I transferred from another Rockwell division to RHO 1-1/2 years ago and was eligible for the 85-point system at that time. Will I lose it?

A. It would be best for employees to contact their own benefits administrators for information on their current pension, stock and savings plans because these are tailored to individual corporate programs. Members of our Personnel staff can answer questions about Westinghouse's program, but we are unfamiliar with those of the other contractors." (emphasis added)

In a subsequent issue under the heading "Continuity of Service Date," the April 17, 1987 Consolidated News states:

"The basic rule for determining

> your continuity of service date is simple. On transferring to WHC, you will be credited with the same service recognized by your current employer just prior to transfer, PLUS any prior service with WHC, BCSR, Westinghouse or Boeing. The restoration of prior Westinghouse or Boeing service is based on a long-standing Westinghouse and Boeing practice that carries over to the new company."

However, one paragraph later in the same Consolidated News under the heading "Pension Plan Service," it states:

> "Rules for determining service for pension plan purposes are considerably different and much more complex. In the near future, we will review how service dates for pension plan vesting and benefits will be determined under the new WHC pension plan and at the same time will provide you with the highlights of our new pension, savings and insurance plan."

Subsequently, WHC sent out to employees a memorandum and questionnaire entitled "Pension Plan Service Credits

For Non-Bargaining Unit Employees" which was designed to determine what prior service, if any, would be restored. The memorandum also contains language which supports defendants' position. Some excerpts are set forth below:

> "Many employees have service with more than one of the contractors involved in the O&E consolidation. And some also may have service with parent companies prior to transferring to Hanford. Such service may count for vesting and/or benefit purposes -- whether or not it counts for vacation purposes.
>
> First of all, the new WHC/BCSR Pension Plan will accept the same service recognized by your 'predecessor employer' as of June 28. Additionally, those who have prior service with one or more of the other contractors involved in the O&E consolidation <u>may</u>* also have all or a part of such service restored.
>
> * * *
>
> To ensure that you receive all of the service credits to which

> you are entitled, we are including a questionnaire in this benefits enrollment package. Please complete and return the questionnaire if you have prior service with any of the contractors or parent companies of the contractors involved in the O&E consolidation that has not been credited by your present employer. Your individual case will be reviewed and you will be notified if any service adjustment is to be made. While it may take weeks or months to complete all of these individual reviews, any pension service adjustments will be effective June 29 (retroactively, if necessary)."

The following language is contained in the questionnaire accompanied by the cover memorandum:

> "When you transfer to Westinghouse Hanford Company or BCS Richland effective June 29, you will take with you the service recognized by your 'predecessor employer' as of June 28. In addition, some of you may be eligible to have some prior service restored.
>
> * * *

> If you had prior service with BCSR, RHO, UNC, WHC or their parent Companies, which has not been credited by your present employer for pension plan purposes, such service may be restored depending on the specific circumstances in each case."
>
> ---
>
> *It should be noted, as defendants point out for the court, that in quoting this identical section in their memorandum in support of motion for summary judgment, the plaintiffs have conveniently changed the "may" to "will." Such a change significantly alters the meaning of this paragraph.

It is apparent to this court, upon review of Attachment C, that the questionnaire is just what it is entitled - a questionnaire designed to elicit information regarding restoration of service. Furthermore, the language of both the questionnaire and its cover memorandum clearly state only that prior

service may be restored. The questionnaire is unambiguous in its pronouncement that employees will take with them service recognized by their predecessor employer and that prior service with BCSR, RHO, WHC, UNC or their parent companies may be restored for pension plan purposes depending upon the specific circumstances of each case. Any other interpretation of the language is not only untenable, but also unreasonable.

Finally, plaintiffs contend that the summary booklet distributed in June of 1987 also supports their argument, On what is marked page two of the booklet, it states:

> "If you become a participant of the plan on June 29, 1987, you will receive credit for prior service in accordance with your prior plan's provisions; however, no credit will be

> given for service before January 1, 1965."

This paragraph is the only reference to restoration of prior service contained in the entire document. After reading the booklet several times, it is obvious that the use of the singular "plan's" is made in reference to only the employee's plan immediately prior to consolidation, leading this ocurt to conclude that the booklet states the position taken by the defendants and the position that is embodied in the HOEPP formal plan document (Attachment E) adopted in December, 1987, that employees are not entitled to have their prior years of service with other Hanford contractors recognized for the purpose of calculating their pension benefits unless those prior years of service were recognized for that purpose by the employer for whom the

employee in question was working immediately prior to consolidation.

Even if construed with extreme liberality and viewed in a light most favorable to the plaintiffs, the documents comprising Attachment C are at best, ambiguous on the subject of linking of prior service for calculation of pension benefits purposes. The documents unquestionably do not affirmatively demonstrate, as plaintiffs suggest, that they shall receive credit for all the prior service for which they are seeking in calculating their pension benefits. It is curious that the plaintiffs have failed to point out to the court any passage in the Attachment C documents which affirms their position. Consequently, even if the court were to consider these documents as the formal

written instrument which governs the consolidated pension plan, their plain language does not entitle the plaintiffs to the benefits which they seek.

The parties have stipulated, based on Attachment C, that the plaintiffs could reasonably believe that all of their prior years of service for all DOE contractors operating at the Hanford site from January 1, 1965 forward would be recognized under the new WHC pension plan for benefit calculation purposes. After reviewing the same documents, this court finds that while the plaintiffs may have reasonably believed they were entitled to such benefits, the plain language of the documents simply does not so entitle them. Accordingly, plaintiffs' first theory of recovery must fail.

4. Summary Plan Description

ERISA requires that the administrator of each employee benefit plan furnish to each participant a summary plan description. 29 USC §1021(a). The style and contents of the summary plan description which must be furnished to participants is set forth in 29 USC §1022. Courts have held that when a pension plan issues to its participants a summary plan which is inconsistent with the plan description, the participant's rights are governed by the summary plan provisions upon which he or she reasonably believes. McKnight v. Southern Life and Health Ins. Co., 758 F.2d 1566 (11th Cir., 1985); Kochendorfer v. Rockdale Sash & Trim Co., Inc., 653 F.Supp. 612 (N.D.Ill., 1987). The courts have so held because,

> "it is of no effect to publish and distribute a plan summary

> booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet."

McKnight, 758 F.2d at 1570.

Plaintiffs contend that the booklet summarizing the highlights of the pension plan is just such a summary plan description. The introduction to the booklet states "[t]his brochure is only a summary of the formal plan document that controls operation of the pension plan . . . ." (Attachment C to the Stipulation). In response, defendants contend that the booklet cannot be a "summary plan description" under ERISA because it does not comply with the requirements of 29 USC §1022(b). They further contend that even if the booklet

is an ERISA summary plan description, it is not inconsistent with defendants' position regarding linking of service for pension benefit calculation purposes. Any suggestion that a booklet describing itself as "a summary of the formal plan document" which contains "highlights of the revised multiple-employer pension plan" is not a summary plan description is meritless. Accordingly, this court will treat the booklet contained in Attachment C and entitled "Pension Plan for Non-Bargaining Unit Employees of WHC/BCSR" as a section 1022 summary plan description.

The parties have stipulated that at the time of consolidation and for a time thereafter, based upon all of the documents comprising Attachment C, that it was reasonable for plaintiffs to

believe that all of their prior years of service for all DOE contractors operating at the Hanford site would be recognized under the new pension plan for benefit calculation purposes. While the belief may have been reasonable based upon all of the documents in Attachment C, standing alone, the booklet does not support plaintiffs' position. As set forth in the pages above, the booklet in Attachment C which summarizes the plan contains but one paragraph on the linkage of service issue and is not inconsistent with the formal HOEPP plan adopted in December, 1987 with respect to such issue.

Furthermore, the Seventh Circuit has held that when the summary booklet expressly states that it is merely an outline of the pension plan and that the

formal text of the plan governs in the event a question arises, the plaintiffs cannot rely on the general statements of the booklet but must look to the plan itself. Kolentus v. Avco Corp., 798 F.2d 949 (7th Cir., 1986), cert. denied, 479 U.S. 1032 (1987). This is precisely the scenario that is presented in the instant case. The introduction to the summary booklet cautions that "since this brochure is only a summary of the formal plan document that controls operation of the pension plan, any questions concerning the specific interpretation or administration of the plan will be resolved based on actual provisions of the formal plan document." Plaintiffs' interpretation of the booklet can only be characterized as myopic. The plaintiffs focus in on a single paragraph which they

contend supports their theory of liability, yet they ignore the introductory paragraph which specifically cautions that the booklet is not the formal plan document and that any questions will be resolved based upon the actual provisions of the formal plan. This court cannot allow them to base liability upon such a theory.

5. Equitable Estoppel

Plaintiffs next assert that because of certain conduct and information that was conveyed to them, the administrator of the WHC pension plan should be estopped from administering the plan in a manner that fails to give them credit under the provisions of the plan for benefit calculation purposes for the years of service for which the plaintiffs contend that they are entitled to receive

credit. In response, defendants correctly argue that the defendant HOEPP plan may not be required by estoppel to make payments not authorized by its written terms. See Hansen v. Western Greyhound Retirement Plan, 859 F.2d 779, 781 (9th Cir., 1988); Davidian v. Southern California Meat Cutters Union, 859 F.2d 134, 135-36 (9th Cir., 1988). Accordingly, such a claim against the plan must be dismissed.

While plaintiffs cannot bring such a claim against the plan, the Ninth Circuit has not foreclosed an action against the plan's administrator. It held that "[e]ven though ERISA preempts common law theories of contract law, see Blau v. Del Monte Corp., 748 F.2d 1348, 1356-57 (9th Cir., 1984), cert. denied, 474 U.S. 865 (1985), the principles of equitable

estoppel apply to pension plans." Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir., 1986). In this circuit, equitable estoppel is available against a nongovernmental party (the administrator of the plan) who has made a knowing false representation, or concealment of material facts, to a party ignorant of the true facts, with the intention that the other party should rely on the representation, and the other party actually and detrimentally relied on it. Id. While plaintiffs' first theory of liability was amenable to disposition on summary judgment, the estoppel issue does not appear to be quite so resolvable because of disputed issues of fact regarding reliance. Furthermore, the plaintiffs' claims must be considered separately because it is

not clear that they were all privy to or relied upon the same representations. It is stipulated that all the plaintiffs received the documents included in Attachment C at or near the time of consolidation. As set forth below, however, there exist disputed issues of fact with respect to other information plaintiffs received regarding the linkage of service.

During the first several months after consolidation, and prior to the formal adoption by WHC of the HOEPP formal written document, at least three individuals who were similarly situated to the plaintiffs, retired and had their prior service (post-1965) on the site linked together for the purpose of calculating their pension benefits, even though certain portions of their prior

service were not recognized for this purpose by their employers prior to consolidation. There is a dispute whether and to what extent Mike Byrd, plan administrator, specifically authorized this treatment of prior service in these three cases. However, there is no dispute that Byrd became aware of the situation no later than early 1988 and that WHC did nothing for over one year. At that time WHC wrote the individuals stating that the original calculation of their benefits had been mistaken and that their benefits had been reduced.

In a most unhelpful fashion, the stipulation states that some of the plaintiffs were aware that all prior service on the site had been linked for the purpose of computing these three

employees' benefits and that other plaintiffs did not become aware of this fact until this lawsuit was begun.

The stipulation also states that some of the plaintiffs contend that they were receiving pension payments prior to consolidation which were based upon their years of service with WHC and other Westinghouse affiliates. Defendants deny this contention.

The stipulation further states that plaintiff Meyers will testify that oral statements were made to him by members of WHC's management personnel in July of 1985 to the effect that all of Mr. Meyers' prior years of service with WHC would be reconsolidated by WHC for pension benefit calculation purposes whenever Meyers returned to any subsidiary of the Westinghouse

organization. Westinghouse will offer no testimony to the contrary.

At some point not later than the first half of 1988, while still employed by Westinghouse, each of the plaintiffs learned that Westinghouse would not calculate their retirement benefits in the manner in which plaintiffs claim they ought to be calculated.

Most importantly, with respect to this particular issue, as set forth on pages 9-11 in the Stipulation, there are serious issues of fact with respect to the extent plaintiffs relied upon the facts as represented by the defendants.

Despite what appear to be genuine issues of material fact precluding summary judgment, this court finds that the plaintiffs' estoppel claim fails for another reason. As set forth above,

equitable estoppel is available against a party who has made a "knowing false representation." Dockray v. Phelps Dodge Corp., 801 F.2d at 1155. The parties have stipulated that "plaintiffs were not deliberately misled by WHC concerning their pension benefits. Any inaccurate or misleading information which was provided to them by WHC was the result of uncertainty or confusion, and was provided in good faith." (Stipulation, p. 12, ¶30). Based upon the stipulation, the defendants could have not made a knowing false representation. Thus, the doctrine of equitable estoppel is inapplicable and plaintiffs' claims based thereon must be dismissed.

In regards to plaintiffs' equitable estoppel claim, this court must note that plaintiffs have not been deprived of any

pension benefits which had accrued as of June 27, 1987. That is, under the new consolidated plan, plaintiffs are entitled to recognition of prior service for pension benefit calculation purposes to the identical extent as recognized by their employer immediately prior to consolidation. Simply put, if plaintiffs' pension plan immediately prior to the consolidation recognized prior service, then so does the new plan. By accepting employment with WHC, plaintiffs were deprived of nothing except the mistaken expectation that they were entitled to linkage of all prior on-site service with respect to pension benefit calculation purposes. The defendants have characterized the relief plaintiffs seek as a "windfall" because consolidation, which otherwise did not

change plaintiffs' job duties and compensation, allegedly brought them a substantial increase in their pensions. The court agrees with such a characterization.

6. Violation of 29 USC §1060(b)

In their response to defendants' cross-motion for summary judgment, plaintiffs, for the first time, raise an additional theory of recovery. Plaintiffs contend that provisions of the HOEPP, as interpreted and applied by the administrative committee, violate the provisions of 29 USC §1060(b). This section provides:

> "For purposes of this part and part 3--
>
> (1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor employer shall be treated as service for the employer, and

> (2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary of the Treasury, be treated as service for the employer."

29 USC §1060(b). (part 2 governs participation and vesting and part 3 governs funding). This particular section of the ERISA statute has received little treatment in the federal courts. This court could find only one reference to section 1060(b)(1) - Phillips v. Amoco Oil Co., 614 F.Supp. 694 (N.D. Ala., 1985), aff'd, 799 F.2d 1464 (11th Cir., 1986), cert. denied, 481 U.S. 1016 (1987). In Phillips the district court found that section 1060(b)(1) did not apply because the employer was not maintaining a plan of a predecessor employer. Accordingly, discussion on

that section was limited.

Plaintiffs claim that the defendants are maintaining the pre-consolidation plans of UNC, Rockwell, BCSR, as well as WHC's own pre-consolidation pension plan. They argue that section 1060(b)(1) mandates that their years of service for the predecessor employers be treated as service for their new employer. It should be noted that in quoting the statute, as defendants point out, plaintiffs have omitted the introductory language which limits application of section 1060 to parts 2 and 3 of ERISA.

In reply, defendants contend that section 1060(b)(1) requires that service for a predecessor employer be treated as service for the new employer for purposes of parts 2 and 3 of ERISA. They claim that these parts establish minimum

requirements for participation, vesting, funding and rate of accrual of benefits. They further argue that while section 1060(b) provides that in certain cases, service with the predecessor employer must be taken into account for the purpose of determining compliance with these requirements, it does not provide that such prior service must be taken into account in the plan formula or for the purpose of computing the amount of benefits under the plan.

The defendants argue, and this court agrees, that it is fundamental to the scheme of ERISA that it neither requires employers to adopt a pension plan nor establish any level of benefits that must be provided or any particular formula that must be used. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).

They conclude that to read section 1060(b) as requiring a plan to take into account service with a predecessor employer in determining the amount of benefits would be contrary to this basic principle.

Defendants' argument has merit. By its literal terms, section 1060(b)(1) applies to only parts 2 and 3 of ERISA. As defendants point out, these sections establish minimum requirements for participation, vesting, funding, and rate of accrual of benefits. Under the terms of section 1060(b), service with the predecessor employer must be taken into account for the purpose of determining if the statutory minimums have been met for participation, vesting, funding, and rate of accrual of benefits, but not for the actual computation of benefits.

Furthermore, the statute mandates that when "the employer [WHC] maintains a plan of a predecessor employer [UNC, RHO, WHC, and BCSR], service for such predecessor shall be treated as service for the employer." This is precisely what WHC has done. Under the consolidated plan, employees are entitled to have prior years of service with other Hanford contractors recognized for the purpose of calculating their pension benefits if those prior years of service were recognized for that purpose by the predecessor employer for whom the employee in question was working immediately prior to consolidation.

This court finds no merit in plaintiffs' third theory of liability.

7. Attorneys' Fees

Plaintiffs also move for attorneys'

fees as the prevailing party. Because plaintiffs have not prevailed, they are not entitled to attorneys' fees and thus, their request is hereby denied.

IT IS SO ORDERED. The Clerk shall enter this Order and forward copies to counsel.

DONE this 17th day of July, 1990.

S/ Alan A. McDonald
United States District Judge

(Filed in U. S. Dist. Ct., E.D. of Wash., 7/18/90)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al	)	C-88-391-AAM
	)	C-88-582-AAM
vs.	)	
	)	JUDGMENT IN A
WESTINGHOUSE HANFORD CO.	)	CIVIL CASE
	)	

DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment be entered for the Defendant.

Date: August 2, 1990

JAMES R. LARSEN, Clerk

S/ Barbara A. Speer, Deputy Clerk

(Filed 8/2/90)

Alex J. Skalbania
CRITCHLOW, WILLIAMS & SCHUSTER
P. O. Box 1487
Richland, WA 99352
Ph. (509) 946-6181
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al,	)	C-88-391-AAM
	)	Consolidated w/
Plaintiffs,	)	C-88-582-AAM
	)	
vs.	)	MOTION FOR
	)	RECONSIDERATION
WESTINGHOUSE HANFORD	)	
COMPANY, et al,	)	
	)	
Defendants.	)	

COME NOW the plaintffs in the above-entitled cause, by and through their attorneys of record herein, CRITCHLOW, WILLIAMS & SCHUSTER, per Alex J. Skalbania, and, pursuant to Federal Rule of Civil Procedure 59 and Federal Rule of Civil Procedure 6, hereby request the court to reconsider its Order in this

matter dated July 18, 1990 and to enter an Order granting the plaintiffs' Motion for Summary Judgment and denying defendants' Motion for Summary Judgment for the reasons that are set forth in the accompanying Memorandum in Support of Plaintiffs' Motion for Reconsideration.

DATED: This 1st day of August, 1990.

CRITCHLOW, WILLIAMS & SCHUSTER
Attorneys for Plaintiffs

By: S/ Alex J. Skalbania
WSBA #15412

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al, and MARTIN L. HAGOOD,	)	C-88-391-AAM C-88-582-AAM
Plaintiffs,	)	O R D E R
vs.	)	
WESTINGHOUSE HANFORD COMPANY, et al,	)	
Defendants.	)	

Plaintiffs' Motion for Reconsideration came before the court upon hearing without oral argument. Alex Skalbania appeared on behalf of plaintiffs. Marvin Gray represented defendants. After reviewing plaintiffs' motion, including the memorandum in support and the entire court record, the court being fully advised in this matter,

IT IS HEREBY ORDERED that the plaintiffs' Motion for Reconsideration be

DENIED.

DISCUSSION

In the above-captioned case, plaintiffs move, pursuant to Fed. R. Civ. P. 59(e), for reconsideration of this court's order granting defendants' cross-motion for summary judgment and denying plaintiffs' cross-motion for summary judgment. The motion, however, raises no new legal arguments nor does it set forth any new evidence. Instead, it is merely a reargument of those identical theories asserted on summary judgment.

A motion for reconsideration of summary judgment is appropriately brought under Rule 59(e). Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir., 1985). Such a motion is properly denied where the movant presents no arguments that had not already been raised in opposition to

summary judgment. Id.

As the defendants aptly point out in their response, plaintiffs' motion (while lengthy, detailed and overlength, 22 pages 1 and 1/2 spaced rather than the requisite double spaced) is nothing but an attempt at another bite at the apple. The motion presents no new evidence or legal authority, but is instead a rehash of arguments presented on summary judgment. Accordingly, it shall be summarily denied.

Defendants also move for Rule 11 sanctions in the form of costs incurred in responding to plaintiffs' motion for reconsideration. The Ninth Circuit has upheld a district court's award of Rule 11 sanctions upon finding a Rule 59(e) motion frivolous because it introduced nothing new. MGIC Indem. Corp. v.

Weisman, 803 F.2d 500, 505 (9th Cir., 1986). Upon reflection, however, this court shall not impose such sanctions.

IT IS SO ORDERED. The Clerk shall enter this Order and forward copies to counsel.

DATED: This 10th day of September, 1990.

S/ Alan A. McDonald
United States District Judge

(Filed 9/10/90)

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN CARVER, et al,	)	C-88-391-AAM
	)	Consolidated w/
Plaintiffs,	)	C-88-582-AAM
	)	
vs.	)	NOTICE OF APPEAL
	)	
WESTINGHOUSE HANFORD COMPANY, et al,	)	
	)	
Defendants.	)	

NOTICE IS HEREBY GIVEN to defendants, Westinghouse Hanford Company, et al and to Marvin L. Gray, Jr., DAVIS WRIGHT TREMAINE, 2600 Century Square, 1501 Fourth Avenue, Seattle, WA 98101-1688, counsel of record herein for said defendants, that plaintiffs, John Carver, et al, hereby appeal to the Court of

Appeals for the Ninth Circuit from that certain Order granting defendants' Cross-Motion for Summary Judgment and denying plaintiffs' Cross-Motion for Summary Judgment entered in the above-entitled cause on July 18, 1990, and from that certain subsequent Order denying plaintiffs' Motion for Reconsideration entered herein on September 10, 1990.

DATED: This 18th day of September, 1990.

CRITCHLOW, WILLIAMS & SCHUSTER
Attorneys for Plaintiffs

By: S/ Alex J. Skalbania
WSBA #15412

(Filed 9/20/90)

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN CARVER, AL SAMPSON, HERBERT BARRUS, BILL McCLUNG LEONARD L. LUST, DONALD J. MEYERS,	)	No. 91-35002 D.C. No. CV-88-391-AAM
Plaintiffs-Appellants,	)	O P I N I O N
v.	)	
WESTINGHOUSE HANFORD COMPANY, a corporation; HANFORD OPERATIONS AND ENGINEERING PENSION PLAN,	)	
Defendants-Appellees.	)	

Appeal from the
United States District Court
for the Eastern District
of Washington
Alan A. McDonald, District Judge,
Presiding

Argued and Submitted
July 11, 1991 - Seattle, Washington

Filed December 17, 1991

Before: Dorothy W. Nelson,
John T. Noonan, Jr. and

Thomas G. Nelson, Circuit Judges

Opinion by Judge T.G. Nelson

SUMMARY

ERISA

Affirming a district court grant of summary judgment, the court of appeals held that the district court had properly determined that an employer's ERISA pension plan properly failed to recognize prior employee service for other contractors at the Hanford Nuclear Reservation.

Appellant John Carver and other employees brought a claim under ERISA to challenge Westinghouse Hanford Company's refusal to recognize prior employee service for other contractors at the Hanford Nuclear Reservation. Appellants were employees of predecessor DOE

contractors now employed at the nuclear reservation without any changes in their salaries or employment status. At the time of consolidation of the activities at the nuclear plant, WHC provided documents to employees explaining the ramification of the consolidation to their employment status and benefits. Included were documents explaining the new proposed pension plan that was to take effect at the time of consolidation. On cross motions for summary judgment, the district court found in favor of WHC.

[1] The district court found appellants' argument that the documents they received established a pension plan unconvincing. In Scott, for example, the court noted that the existence of a written instrument is not necessarily a prerequisite to ERISA coverage. [2]

Although WHC never denied the existence of a pension plan, it denied that the documents in question were to be the binding informal plan. [3] The court stated that WHC should have explained in its communications that the plan was not formalized and was subject to DOE approval. However, its failure to do so did not elevate the documents in question to the level of an informal ERISA plan. [4] In addition, the documents were consistent with the plan subsequently formalized and did not violate §1054(g) of ERISA.

[5] The court rejected appellants' argument that the plan administrator should be equitably estopped from interpreting the plan in a manner that does not give them credit for the time they believe they deserve. Any

inaccurate or misleading information that was provided was the result of uncertainty or confusion, and was provided in good faith. [6] The court held that lacking any false representation or concealment of material facts, the appellants could not prevail on their allegation that WHC concealed material facts. [7] 29 USC §1060(b) does not require WHC to tack the years of service accrued for the predecessor employers onto the pension plan adopted by WHC. [8] Accordingly, the court agreed with the Eleventh Circuit that ERISA does not require a successor employer to credit years of service with the predecessor employer where the successor does not maintain the benefit plan of the predecessor. [9] Phillips, Alessi and a literal reading of section

1060(b) supported the court's conclusion that WHC was not required to add the prior service to the benefits computation.

COUNSEL

Alex J. Skalbania, Critchlow, Williams & Schuster, Richland, Washington, for the plaintiffs-appellants.

Marvin L. Gray, Jr., Davis, Wright & Tremaine, Seattle, Washington, for the defendants-appellees.

OPINION

T. G. NELSON, Circuit Judge:

John Carver and his fellow employees appeal the district court's grant of summary judgment in favor of Westinghouse Hanford Company (WHC) in their action under the Employees Retirement Income Security Act (ERISA), 29 USC §§1001-1461. The appellants allege that WHC's Operating and Engineering Pension Plan

(HOEP Plan) improperly failed to recognize prior service for other contractors at the Hanford Nuclear Reservation (HNR). We affirm the summary judgment.

FACTS AND PROCEEDINGS BELOW

The parties have stipulated to the following facts. In 1986 the Department of Energy (DOE) decided to consolidate the primary responsibility for daily operation of the HNR in the hands of one private contractor. WHC was selected and the consolidation was to be completed by June 29, 1987. Prior to consolidation each contractor operated its own pension plan for its own employees. Since most of these employees would then work under the consolidated contractor, it was decided prior to consolidation that a reservation pension plan should be

adopted into which the assets of the previous pension plans would be merged.

WHC's "final pay" plan had a graduated vesting schedule. The monthly retirement benefit would generally be 1.6% of average monthly compensation over the highest five compensation years, multiplied by the number of years of employment that were recognized under the plan. Employees were 60% vested after five years of service and 100% vested after ten years.

WHC recognized that there would be a question as to how employees would receive recognition under the new pension plan for the years of service previously accumulated at HNR under all of the various contractors. Subject to DOE approval, WHC initially intended that the new plan would recognize all of an

employee's prior years of service at HNR after 1965. The DOE, however, determined that only the employees' years of service that were recognized by his or her employer for pension purposes immediately prior to consolidation should be recognized under the new pension plan.

As a result of extended negotiations between the DOE and WHC, the final pension plan was not adopted until December, 1987. It ultimately received DOE approval in March, 1989, nearly two years after consolidation of operations into WHC had been completed. In the interim, WHC attempted to keep its employees informed as to their rights under the new pension plan.

The plaintiffs in this case were employees of predecessor DOE contractors now employed at WHC with no material

changes in their job duties or salaries. At the time of consolidation, June, 1987, WHC provided documents to employees explaining the ramification of the consolidation to their employment status and benefits. Included were papers ocntaining information regarding the new proposed pension plan that was to take effect at the time of consolidation. The documents consisted of: (1) a questionnaire regarding linking of prior service; (2) three issues of a regularly published newsletter designed to keep employees informed about the consolidation; and (3) a booklet summarizing the highlights of the new consolidated pension plan. These documents were identified as "Attachment C" to the Stipulation and were the only documents provided to the employees

between June and December, 1987, when WHC formally adopted the pension plan.

After accepting employment with WHC, the plaintiffs learned that the consolidated company would not calculate their retirement benefits based on the entirety of periods of service with prior contractors. WHC ultimately adopted the DOE position and would not give credit under its pension plan for prior years of service at Hanford or elsewhere unless such service would have been recognized by the pension plan in which the employee participated immediately before consolidation. On cross motions for summary judgment, the district court decided in favor of WHC. This appeal resulted. We affirm.

STANDARD OF REVIEW

A grant of summary judgment is

reviewed de novo. Kruso v. Int'l. Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir., 1989). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire & Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir., 1989).

DISCUSSION

I

ERISA is a remedial statute which Congress enacted to protect employee pension benefit rights and to protect employers from conflicting and inconsistent state and local regulations of pension benefit plans. Shaw v. Delta Air Lines, 463 U.S. 85, 90-91 (1983). A

pension bneefit plan may be created even without a formal intentional plan adoption if "from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir., 1982) (en banc).

In this case, one of the basic contentions of the appellants is that the informal documents described as Attachment C, the questionnaires, the newsletter, and the preliminary summary booklet, established a pension plan. They argue further that the formal plan eventually adopted in December, 1987, reduced the benefits established by the Attachment C documents. As an amendment

reducing benefits, their argument goes, the formal plan is in violation of 29 USC §1054(g) and §1082(c)(8).*

---

*29 USC §1054(g) provides "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in . . . 29 USC §1082(c)(8)." Section 1082(c)(8) provides further that no amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary . . . [of Labor] . . . notifying him of such amendment and the Secretary has approved such amendment or, within ninety (90) days after the date on which such notice was filed, has failed to disapprove such amendment. . . .

[1] The district court found this argument unconvincing. First, it found the cases cited by the appellants inapposite. See Donovan, Scott v. Gulf Oil, 754 F.2d 1499 (9th Cir., 1985); Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir., 1985). Each of these cases discussed the variety of ways a de facto pension plan could be created through surrounding circumstances. In Scott, for example, the court noted that the existence of a written instrument is not necessarily a prerequisite to ERISA coverage (citing Donovan). Informal actions could create coverage if the surrounding circumstances would indicate to a reasonable man that benefits exist. Donovan at 1373. The district court found the appellants' reliance on these cases misplaced because "the defendants

have never denied the existence of a pension plan nor have they contended that ERISA does not apply." Excerpts of Record at 28. ("E.R.")

[2] Although WHC never denied the existence of a pension plan, it does deny that the Attachment C documents were to be the binding informal plan as of June, 1987. The purpose of the documents was to apprise anxious employees of what they might expect once the transition from several employers to WHC was completed, WHC had not completed its negotiations with DOE, and consequently, had not adopted a plan.

Donovan explains that intent to create a plan is not enough:

> A decision to extend benefits is not the establishment of a plan or program. Acts or events that record, exemplify or implement the decision will be direct or circumstantial

> evidence that the decision has become reality . . . assuring employees that a plan or program exists [for example] - but it is the reality of a plan, fund or program and not the decision to extend certain benefits that is determinative.

Id. at 1373.

[3] WHC should have explained in its communications that the plan was not formalized and was subject to DOE approval. Failure to do so, however, did not elevate the newsletters and the preliminary summary booklet to the level of an informal plan in June, 1987. The plan simply was not a reality until that December when it was formally adopted.

[4] Moreover, the documents were consistent with the plan formalized in December as well as the final summary booklet and, therefore, did not violate §1054(g). While each of the documents discusses the accrual of prior service,

the most recognition the documents provide of prior service was that employees would take with them service recognized by their immediate predecessor employers and that prior service might be restored depending on the specific circumstances of each employee. The June, 1987, summary booklet, which makes only one reference to this issue, states:

> If you become a participant of the plan on June 29, 1987, you will receive credit for prior service in accordance with your prior plan's provision; however, no credit will be given for service before January 1, 1965.

E.R. 66C.

The district court noted:

> This paragraph is the only reference to restoration of prior service contained in the entire document. After reading the booklet several times, it is obvious that the use of the singular "plan's" is made in reference to only the employee's plan immediately

(4)

91-1905

Supreme Court, U.S.
FILED
MAR 16 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

JOHN CARVER, AL SAMPSON,
BILL McCLUNG, DONALD J. MEYERS,
and MARTIN L. HAGOOD

Petitioners

v.

WESTINGHOUSE HANFORD COMPANY,
a corporation;
HANFORD OPERATIONS AND ENGINEERING PLAN

Respondents.

VOLUME 3 OF 3
APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
UNITED STATES

CRITCHLOW, WILLIAMS, SCHUSTER,
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> prior to consolidation, leading this court to conclude that the booklet states the position taken by the defendants and the position that is embodied in the HOEPP formal plan document. (Attachment E) adopted in December, 1987, that employees are not entitled to have their prior years of service with other Hanford contractors recognized for the purpose of calculating their pension benefits unless those prior years of service were recognized for that purpose by the employer for whom the employee in question was working immediately prior to consolidation.

E.R. 35-6.

If the summary booklet had varied from the formal plan, WHC may not have been able to enforce it. This is true even though the booklet contained a disclaimer. See Bower v. Bunker Hill Co., 725 F.2d 1221, 1224 (9th Cir., 1984). We need not reach this issue, however, because we agree with the district court that both the preliminary

summary booklet issued in June, 1987, and its final version which was identical on this issue and disseminated in January, 1988, were consistent with the formal plan.

II

[5] The appellants allege further that the plan administrator should be equitably estopped from interpreting the plan in a manner which does not give them credit for the time they believe they deserve. The appellants' argument is fatally flawed because the critical element of knowing false representation is missing from their argument. We have previously held:

> In this circuit, estoppel is available against a non-governmental party who has made a knowing false representation, or concealment of material facts, to a party ignorant of the true facts, with the intention that the other party

> should rely on the representation and the other party actually and detrimentally does rely.

Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1155 (9th Cir., 1986). The parties stipulated that "plaintiffs were not deliberately misled by WHC concerning their pension benefits. Any inaccurate or misleading information which was provided to them by WHC was the result of uncertainty or confusion, and was provided in good faith." Stipulation at 12.

[6] At oral argument, however, counsel for the appellants conceded the stipulation but nonetheless argued that WHC "concealed material facts." Apparently, he is finding a critical difference between a knowing false representation and a concealment. Counsel submitted two details that WHC

allegedly concealed. First, he argued that they hit the fact that WHC was still negotiating with the DOE over the benefit plan. Secondly, he argued they concealed that the DOE "was opposed to a linking of service." We note that such a distinction between concealment and a knowing false representation might make for an interesting discussion. We decline the temptation, however, because counsel has raised this issue for the first time on appeal. Barring exceptional circumstances that do not exist here, we will not consider issues that were not first argued to the district court. Bolker v. C.I.R., 760 F.2d 1039, 1042 (9th Cir., 1985). Consequently, we hold that lacking any false representation or concealment of material facts, the appellants cannot

prevail on this theory of law.

III

[7] Lastly, the appellants assert that 29 USC §1060(b) requires WHC to tack the years of service accrued for the predecessor employers onto the pension plan of WHC. A literal reading of the statute defeats their argument. The statute provides that:

> For purposes of this part and part 3 -
> (1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor shall be treated as service for the employer, and
> (2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary of the Treasury, be treated as service for the employer.

29 USC §1060(b).

The district court interpreted this

provision literally, noting that at the outset, the section signifies on its face that it pertains only to parts 2 and 3 of ERISA. These sections establish minimum requirements for participation, vesting, funding, and rate of accrual of benefits. See 29 USC §§1051-61; §§1081-86. There is nothing in these provisions relating to the amount of benefits to be calculated into the plan formula.

[8] In Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir., 1986), cert. denied 481 U.S. 1016 (1987), the Eleventh Circuit came to the sound conclusion that "ERISA does not require a successor employer to credit years of service with the predecessor employer where the successor does not maintain the benefit plan of the predecessor." Id. at 1471. Instead, that court held, "the statutory

language and legislative history of the section make clear that Congress intended to leave the question whether to require such credit to the Secretary of the Treasury and that no such credit would be required absent the promulgation of regulations to that effect." Id. at 1470. We agree.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 513-514 (1981) held that Congress itnended to give administrators the ability to fashion their own plan formulas. "[T]he statutory definition of 'nonforfeitable' assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit." Id. at 513. (finding that §1053(a) of ERISA prohibited forfeiture of vested pension

rights).

Guided by Alessi, the district court held that: "[u]nder the terms of section 1060(b), service with the predecessor employer must be taken into account for the purpose of determining if the statutory minimums have been met for participation, vesting, funding, and rate of accrual of benefits, but not for actual computation of benefits." E.R. 40.

[9] Phillips, Alessi, and a literal reading of §1060(b) support our conclusion that WHC was not required to add the prior service to the benefits computation. Someday, the Secretary may promulgate a regulation requiring such action. Until then, we will refrain from imposing such a requirement.

CONCLUSION

The appellants had hoped to obtain benefits that their earlier employers had already denied them. WHC had clearly never indicated that they would be granted such a windfall. We will not force the company to provide such benefits now.

AFFIRMED.

29 USCS § 1390.

§ 1390. Nonapplicability of withdrawal liability for certain temporary contribution obligation periods; exception

(a) An employer who withdraws from a plan in complete or partial withdrawal is not liable to the plan if the employer --

(1) first had an obligation to contribute to the plan after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980],

(2) had an obligation to contribute to the plan for no more than the lesser of --

(A) 6 consecutive plan years preceding the date on which the employer withdraws, or

(B) the number of years required for vesting under the plan,

(3) was required to make contributions to the plan for each such plan year in an amount equal to less than 2 percent of the sum of all employer contributions made to the plan for each such year, and

(4) has never avoided withdrawal liability because of the application of this section with respect to the plan.

(b) Subsection (a) shall apply to an employer with respect to a plan only if --

(1) the plan is not a plan which primarily covers employees in the building and construction industry;

(2) the plan is amended to provide that subsection (a) applies;

(3) the plan provides, or is amended to provide, that the reduction under section 411(a)(3)(E) of the Internal Revenue Code of 1954 [26 USCS § 411 (a)(3)(E)] applies with respect to the employees of the employer; and

(4) the ratio of the assets of the plan for the plan year preceding the first plan year for which the employer was required to contribute to the plan to the benefit payments made during that plan year was at least 8 to 1.

(Sept. 2, 1974, P.L. 93-406, Title IV, Subtitle E, Part 1, § 4210, as added Sept. 26, 1980, P.L. 96-364, Title I § 104(2), 94 Stat. 1226.)

29 USCS § 1391

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan. The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan.

(1) except as provided in subsections (c) and (d), the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of --

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, as determined under paragraph(2),[;]

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before April 29, 1980, as determined under paragraph (3); and

(C) the employer's proportional

share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after April 28, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending-

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which-

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of --

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after april 28, 1980, and preceding the plan year for which the change is determined.

(C) the unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before April 29, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of --

(i) the unamortized amount of such (as of the end of the plan

year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction --

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before April 29, 1980, is the product of --

A) such unamortized amount; multiplied by --

(B) a fraction -

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before April 29, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before April 29, 1980, by all employers --

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a

plan year is the sum of --

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases of proceedings under title 11, United States Code [11 USCS §§ 101 et seq.], or similar proceedings.[,]

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 4209, 4219(c)(1)(B), or section 4225 [29 USCS §§ 1389, 1399(c)(1) (B), or 1405] against an employer to whom a notice described in Section 4219 [29 USCS § 1399] has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of --

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount.

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d). A plan described in section 4203(b)(1)(i) [29 USCS § 2483 (b)(1)(A)] shall be determined in a manner different from that provided in subsection (b).

(2)(A) The amount of the unfunded vested benefits allocable to any

employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of --

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before April 29, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction --

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before April 29, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before April 29, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after April 28, 1980, and who had not withdrawn from the plan

before such date.

(C) The amount determined under this subparagraph is the product of --

(i) an amount equal to --

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan for the first plan year ending after April 28, 1980; multiplied by

(ii) a fraction --

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending

before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part [29 USCS §§ 1381 et seq.] during those plan years.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this title where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of --

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in

which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction --

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4)(A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of --

(i) the plan's unfunded vested

benefits which are attributable to participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph

is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying --

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction --

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of

plan assets determined under subparagraph (C) by a fraction --

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets determined under subparagraph (C) by a fraction --

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for

the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction --

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with

respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws, is equal to--

(i) an amount equal to --

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to --

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan

assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable

to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5)(A) the corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but

not more than 10 plan years may be sued for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this title, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions.

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of the Internal Revenue Code of 1954 [26 USCS § 404(c), or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c).

(2) Sections 4204, 4209, 4219(c)(1)

(B), and 4225 [29 USCS §§ 1384, 1389, 1399(c)(1)(B), and 1405] shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer. In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part [29 USCS §§ 1381 et seq.] shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans. In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

(Sept. 2, 1974, P.L. 93-406, Title IV, Subtitle E. Part 1, § 4211, as added Sept. 26, 1980, P.L. 96-364, Title I, § 104(2), 94 Stat. 1226.)

29 USCS 1001

PROTECTION OF EMPLOYEE BENEFIT RIGHTS
GENERAL PROVISIONS

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of

employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstates commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of

participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 USCS 1022

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USCS § 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonable apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 USCS § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 USCS § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be

filed in accordance with section 104(a)(1)(D) [29 USCS § 1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS § 1133]).

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 1, § 102, 88 Stat. 841.)

29 USCS 1054

§ 1054. Benefit accrual requirements

(a) Satisfaction of requirements by pension plans. Each pension plan shall satisfy the requirements of subsection (b)(2), and in the case of a defined benefit plan shall also satisfy the requirements of subsection (b)(1).

(b) Enumeration of plan requirements.

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than --

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33 1/3) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to

which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph --

(i) any amendment to the plan which is in effect for the current year shall be treated

as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained

normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of --

(i) his accrued benefit

determined under the plan, as in effect from time to time prior to the date of the enactment of this Act [enacted Sept. 2, 1974], or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "years of service" has the meaning provided by section 202(a)(3)(A) [29 USCS § 1052(a)(3) (A)].

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan --

(i) is funded exclusively by the purpose of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 301(b) [29 USCS § 1081(b)(2) and (3)] (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 301(b) [29 USCS § 1081(b)(4), (5), and (6)] were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act [42 USCS §§ 401 et seq.] which benefits under the plan --

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(2) A plan satisfies the requirements of this paragraph if --

(A) in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and

(B) in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each employee's accrued benefit.

(3)(A) For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 202(b) [29 USCS § 1052(b)]) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

(B) For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which

provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis.

(C) For purposes of this paragraph, in the case of any employee whose service is less than 1,000 hours during any calendar year, plan year or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) the calculation of his period of service shall not be treated as not made on a reasonable and consistent basis merely because such service is not taken into account.

(D) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of participation" shall be such period as determined under regulations prescribed by the Secretary.

(E) For purposes of this subsection in the case of any maritime industry, 125 days of service shall be treated as a year of participation. The Secretary may prescribe regulations to carry

out the purposes of this subparagraph.

(c) Employee's accrued benefits derived from employer and employee contributions.

(1) For purposes of this section and section 203 [29 USCS § 1053] an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2)(A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is --

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and the income, expenses, gains, and losses attributable thereto, of

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less

withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B)(i) In the case of a defined benefit plan providing an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the accrued benefit derived from contributions made by an employee as of any applicable date is the annual benefit equal to the employee's accumulated contributions multiplied by the appropriate conversion factor.

(ii) For purposes of clause (i), the term "appropriate conversion factor" means the factor necessary to convert an amount equal to the accumulated contributions to a single life annuity (without ancillary benefits) commencing at normal retirement age and shall be 10 percent for a normal retirement age of 65 years. For other normal retirement ages the conversion factor shall be determined in accordance with regulations prescribed by the Secretary of the Treasury or his delegate.

(C) For purposes of this

subsection, the term "accumulated contributions" means the total of --

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 203(a)(2) [29 USCS § 1053(a)(2)] does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually at the rate of 5 percent per annum from the beginning of the first plan year to which section 203(a)(2) [29 USCS § 1053(a)(2)] applies (by reason of the applicable effective date) to the date upon which the employee would attain normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts contributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) The Secretary of the Treasury

is authorized to adjust by regulation the conversion factor described in subparagraph (B), the rate of interest described in clause (iii) of subparagraph (C), or both, from time to time as he may deem necessary. The rate of interest shall bear the relationship to 5 percent which the Secretary of the Treasury determines to be comparable to the relationship which the long-term money rates and investment yields for the last period of 10 calendar years ending at least 12 months before the beginning of the plan year bear to the long-term money rates and investment yields for the 10-calendar year period 1964 through 1973. No such adjustment shall be effective for a plan year beginning before the expiration of 1 year after such adjustment is determined and published.

(E) The accrued benefit derived from employee contributions shall not exceed the greater of --

(i) the employee's accrued benefit under the plan, or

(ii) the accrued benefit derived from employee contributions determined as though the amounts calculated under clauses (ii) and (iii) of subparagraph (C) were zero.

(3) For purposes of this section, in

the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(4) In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

(d) Employee service which may be disregarded in determining employee's accrued benefits under plan. Notwithstanding section 203(b)(1) [29 USCS § 1053(b)(1)], for purposes of determining the employee's accrued benefit under the plan, the plan may disregard service performed by the employee with respect to which he has received --

(1) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in an amount (not more than $1,750) permitted under regulations prescribed by the Secretary of the Treasury, or

(2) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to receive.

Paragraph (1) shall apply only if such distribution was made on termination of the employee's participation in the plan. Paragraph (2) shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary of the Treasury.

(e) Opportunity to repay full amount of distributions which have been reduced through disregarded employee service. For purposes of determining the employee's accrued benefit, the plan shall not disregard service as provided in subsection (d) unless the plan provides an opportunity for the participant to repay the full amount of a distribution described in subsection (d) with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) and provides that upon such repayment the employee's accrued benefit shall be recomputed by taking into

account service so disregarded. This subsection shall apply only in the case of a participant who --

(1) received such a distribution in any plan year to which this section applies, which distribution was less than the present value of his accrued benefit,

(2) resumes employment covered under the plan, and

(3) repays the full amount of such distribution with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C).

In the case of a defined contribution plan, the plan provision required under this subsection may provide that such repayment must be made before the participant has any 1-year break in service commencing after such withdrawal.

(f) Employer treated as maintaining a plan. For the purposes of this part [29 USCS §§ 1051 et seq.], an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.

(g) Decrease of accrued benefits through amendment of plan. The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in

section 302(c)(8) [29 USCS § 1082(c)(8)].

(h) Cross reference. For special rules relating to class year plans and plan provisions adopted to preclude discrimination, see sections 203(c)(2) and (3) [29 USCS §1053(c)(2) and (3)].

Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 2 § 204, 88 Stat.858).

29 USCS 1060

§ 1060. Multiple employer plans

(a) Plan maintained by more than one employer. Notwithstanding any other provision of this part [29 USCS §§ 1051 et seq.] or part 3 [29 USCS §§ 1081 et seq.], the following provisions of this subsection shall apply to a plan maintained by more than one employer.

(1) Section 202 [29 USCS § 1052] shall be applied as if all employees of each of the employers were employed by a single employer.

(2) Sections 203 and 204 [29 USCS §§ 1053 and 1054] shall be applied as if all such employers constituted a single employer, except that the application of any rules with respect to breaks in service shall be made under regulations prescribed by the Secretary.

(3) The minimum funding standard provided by section 302 [29 USCS § 1082] shall be determined as if all participants in the plan were employed by a single employer.

(b) Maintenance of plan of predecessor employer. For purposes of this part [29 USCS §§ 1051 et seq.] and part 3 [29 USCS §§ 1081 et seq.] --

(1) in any case in which the employer maintains a plan of a predecessor employer, service for such

predecessor shall be treated as service for the employer, and

(2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary of the Treasury, be treated as service for the employer.

(c) Plan maintained by controlled group of corporations. For purposes of sections 202, 203, and 204 [29 USCS §§ 1052-1054], all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) of the Internal Revenue Code of 1954 [26 USCS § 1563(a)], determined without regard to section 1563(a)(4) and (e)(3)(C) of such code [26 USCS § 1563(a)(4) and (e)(3)(C)] shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the minimum funding standard of section 302 [29 USCS § 1082] shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary of the Treasury.

(d) Plan of trades or businesses under common control. For purposes of sections 202, 203, and 204 [29 USCS §§ 1052-1054], under regulations prescribed by the Secretary of the Treasury, all employees of trades or businesses

(whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (c).

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 2, § 210, 88 Stat.866.)

29 USCS 1061

§ 1061. Application and effective dates

(a) Except as otherwise provided in this section, this part [29 USCS §§ 10511, et seq.] shall apply in the case of plan years beginning after the date of the enactment of this Act [enacted Sept. 2, 1974].

(b)(1) Except as otherwise provided in subsection (d), sections 205, 206(d), and 208 [29 USCS §§ 1055, 1056(d), and 1058] shall apply with respect to plan years beginning after December 31, 1975.

(c)(1) In the case of a plan maintained on January 1, 1974, pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements between employee organizations and one or more employers, no plan shall be treated as not meeting the requirements of sections 204 [29 USCS § 1054] and 205 [29 USCS § 1055] solely by reason of a supplementary or special plan provision (within the meaning of paragraph (2) for any plan year before the year which begins after the earlier of --

(A) the date on which the last of such agreements relating to the plan terminates (determined without regard to any extension thereof agreed to after the date of the enactment of this Act

[enacted Sept. 2, 1974]). or

(B) December 31, 1980.

For purposes of subparagraph (A) and section 306(c) [29 USCS § 1086(c)], any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement contained in this Act or the Internal Revenue Code of 1954 [26 USCS §§ 1 et seq.] shall not be treated as a termination of such collective bargaining agreement. This paragraph shall not apply unless the Secretary determines that the participation and vesting rules in effect on the date of enactment of this Act [enacted Sept. 2, 1974] are not less favorable to participants, in the aggregate, than the rules provided under sections 202, 203, and 204 [29 USCS §§ 1052-1054].

(2) For purposes of paragraph (1), the term "supplementary or special plan provision" means any plan provision which --

(A) provides supplementary benefits, not in excess of one-third of the basic benefit, in the form of an annuity for the life of the participant, or

(B) provides that, under a contractual agreement based on medical evidence as to the effects of working in an adverse environment for an extended period

of time, a participant having 25 years of service is to be treated as having 30 years of service.

(3) This subsection shall apply with respect to a plan if (and only if) the application of this subsection results in a later effective date for this part [29 USCS §§ 1051 et seq.] than the effective date required by subsection (b).

(d) If the administrator of a plan elects under section 1017(d) of this Act [26 USCS § 410 note] to make applicable to a plan year and to all subsequent plan years the provisions of the Internal Revenue Code of 1954 [26 USCS §§ 1 et seq.] relating to participation, vesting, funding, and form of benefit, this part [29 USCS §§ 1051 et seq.] shall apply to the first plan year to which such election applies and to all subsequent plan years.

(e)(1) No pension plan to which section 202 [29 USCS § 1052] applies may make effective any plan amendment with respect to breaks in service (which amendment is made or becomes effective after January 1, 1974, and before the date on which section 202 [29 USCS § 1052] first becomes effective with respect to such plan) which provides that any employee's participation in the plan would commence at any date later than the later of --

(A) the date on which his

participation would commence under the break in service rules of section 202(b) [29 USCS § 1052 (b)], or

(B) the date on which his participation would commence under the plan as in effect on January 1, 1974.

(2) No pension plan to which section 203 [29 USCS § 1053] applies may make effective any plan amendment with respect to breaks in service (which amendment is made or becomes effective after January 1, 1974, and before the date on which section 203 [29 USCS § 1053] first becomes effective with respect to such plan) if such amendment provides that the nonforfeitable benefit derived from employer contributions to which any employee would be entitled is less than the lesser of the nonforfeitable benefit derived from employer contributions to which he would be entitled under --

(A) the break in service rules of section 202(b)(3) [29 USCS § 1052 (b)(3)], or

(B) the plan as in effect on January 1, 1974.

Subparagraph (B) shall not apply if the break in service rules under the plan would have been in violation of any law or rule of law in effect on January 1, 1974.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 2, § 211, 88 Stat.867.)

29 USCS 1082

§ 1082. Minimum funding standards

(a) Avoidance of accumulated funding deficiency.

(1) Every employee pension benefit plan subject to this party shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305 [[29 USCS § 1085]) for any plan year to which this part applies. A plan to which this party applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

(2) For the purposes of this part, the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this part applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

(3) In any plan year in which a multiemployer plan is in reorganization, the accumulated funding deficiency of the plan shall

be determined under section 4243 [29 USCS § 1423].

(b) Funding standard account.

(1) Each plan to which this part applies shall establish and maintain a funding standard account. Such account shall be credited and charged solely as provided in this section.

(2) For a plan year, the funding standard account shall be charged with the sum of --

(A) the normal cost of the plan for the plan year,

(B) the amounts necessary to amortize in equal annual installments (until fully amortized) --

(i) in the case of a plan in existence on January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 40 plan years,

(ii) in the case of a plan which comes into existence after January 1, 1974, the unfunded past service liability under the plan on the first day of the first plan year to which this part applies, over a period of 30 plan years,

(iii) separately, with respect to each plan year, the net increase (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years,

(iv) separately, with respect to each plan year, the net experience loss (if any) under the plan, over a period of 15 plan years, and

(v) separately, with respect to each plan year, the net loss (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 years,

(C) the amount necessary to amortize each waived funding deficiency (within the meaning of section 303(c) [29 USCS § 1083 (c)]) for each prior plan year in equal annual installments (until fully amortized) over a period of 15 plan years, and

(D) the amount necessary to amortize in equal annual installments (until fully amortized) over a period of 5 plan years any amount credited to the funding standard account under paragraph (3)(D).

(3) For a plan year, the funding

standard account shall be credited with the sum of --

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized) --

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years,

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 15 plan years, and

(iii) separately, with respect to each plan year, the net gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years.

(C) the amount of the waived funding deficiency (within the meaning of section 303(c) [29 USCS § 1083(c)]) for the plan year, and

(D) in the case of a plan year for

which the accumulated funding deficiency is determined under the funding standard account if such plan year follows a plan year for which such deficiency was determined under the alternative minimum funding standard, the excess (if any) of any debit balance in the funding standard account (determined without regard to this subparagraph) over any debit balance in the alternative minimum funding standard account.

(4) Under regulations prescribed by the Secretary of the Treasury, amounts required to be amortized under paragraph (2) or paragraph (3), as the case may be --

(A) may be combined into one amount under such paragraph to be amortized over a period determined on the basis of the remaining amortization period for all items entering into such combined amount, and

(B) may be offset against amounts required to be amortized under the other such paragraph, with the resulting amount to be amortized over a period determined on the basis of the remaining amortization periods for all items entering into whichever of the two amounts being offset is the greater.

(5) The funding standard account (and

items therein) shall be charged or credited (as determined under regulations prescribed by the Secretary of the Treasury) with interest at the appropriate rate consistent with the rate or rates of interest used under the plan to determine costs.

(6) In the case of a plan which, immediately before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980 [enacted Sept. 26, 1980], was a multiemployer plan (within the meaning of section 3(37) [29 USCS § 1002(37)] as in effect immediately before such date) --

(A) any amount described in paragraph (2)(B)(ii), (2)(B)(iii), or (3)(B)(i) of this subsection which arose in a plan year beginning before such date shall be amortized in equal annual installments (until fully amortized) over 40 plan years, beginning with the plan year in which the amount arose;

(B) any amount described in paragraph (2)(B)(iv) or (3)(B)(ii) of this subsection which arose in a plan year beginning before such date shall be amortized in equal annual installments (until fully amortized) over 20 plan years, beginning with the plan year in which the amount arose;

(C) any change in past service liability which arises during the period of 3 plan years beginning on or after such date, and results from a plan amendment adopted before such date, shall be amortized in equal annual installments (until fully amortized) over 40 plan years, beginning with the plan year in which the change arises; and

(D) any change in past service liability which arises during the period of 2 plan years beginning on or after such date, and results from the changing of a group of participants from one benefit level to another benefit level under a schedule of plan benefits which --

(i) was adopted before such date, and

(ii) was effective for any plan participant before the beginning of the first plan year beginning on or after such date,

shall be amortized in equal annual installments (until fully amortized) over 40 plan years, beginning with the plan year in which the increase arises.

(7) For purposes of this part --

(A) Any amount received by a

multiemployer plan in payment of all or part of an employer's withdrawal liability under part 1 of subtitle E of title IV [29 USCS §§ 1381 et seq.] shall be considered an amount contributed by the employer to or under the plan. The Secretary of the Treasury may prescribe by regulation additional charges and credits to a multiemployer plan's funding standard account to the extent necessary to prevent withdrawal liability payments from being unduly reflected as advance funding for plan liabilities.

(B) If a plan is not in reorganization in the plan year but was in reorganization in the immediately preceding plan year, any balance in the funding standard account at the close of such immediately preceding plan year --

(i) shall be eliminated by an offsetting credit or charge (as the case may be), but

(ii) shall be taken into account in subsequent plan years by being amortized in equal annual installments (until fully amortized) over 30 plan years.

The preceding sentence shall not apply to the extent of any accumulated funding deficiency

under section 418B(a) of the Internal Revenue Code of 1954 [29 USCS § 418B(a)] as of the end of the last plan year that the plan was in reorganization.

(C) Any amount paid by a plan during a plan year to the Pension Benefit Guaranty Corporation pursuant to section 4222 [29 USCS § 11402] or to a fund exempt under section 501(c)(22) of such Code [26 USCS § 501(c)(22)] pursuant to section 4223 [29 USCS § 1403] shall reduce the amount of contributions considered received by the plan for the plan year.

(D) Any amount paid by an employer pending a final determination of the employer's withdrawal liability under part 1 of subtitle E of title IV [29 USCS §§ 1381 et seq.] and subsequently refunded to the employer by the plan shall be charged to the funding standard account in accordance with regulations prescribed by the Secretary.

(E) For purposes of the full funding limitation under subsection (c)(7), unless otherwise provided by the plan, the accrued liability under a multiemployer plan shall not include benefits which are not nonforfeitable under the plan after the termination of the plan (taking into consideration section

411(d)(3) of the Internal Revenue Code of 1954 [26 USCS § 411(d)(3)]).

(c) Methods.

(1) For purposes of this part, normal costs, accrued liability, past service liabilities, and experience gains and losses shall be determined under the funding method used to determine costs under the plan.

(2)(A) For purposes of this part, the value of the plan's assets shall be determined on the basis of any reasonable actuarial method of valuation which takes into account fair market value and which is permitted under regulations prescribed by the Secretary of the Treasury.

(B) For purposes of this part, the value of a bond or other evidence of indebtedness which is not in default as to principal or interest may, at the election of the plan administrator, be determined on an amortized basis running from initial cost at purchase to par value at maturity or earliest call date. Any election under this subparagraph shall be made at such time and in such manner as the Secretary of the Treasury shall by regulations provide, shall apply to all such evidences of indebtedness, and may be revoked only with the consent

of the Secretary of the Treasury.

(3) For purposes of this part, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan.

(4) for purposes of this section, if --

(A) a change in benefits under the Social Security Act or in other retirement benefits created under Federal or State law, or

(B) a change in the definition of the term "wages" under section 3121 of the Internal Revenue Code of 1954 [26 USCS § 3121], or a change in the amount of such wages taken into account under regulations prescribed for purposes of section 401(a)(5) of the Internal Revenue Code of 1954 [26 USCS § 401(a)(5)],

results in an increase or decrease in accrued liability under a plan, such increase or decrease shall be treated as an experience loss or gain.

(5) If the funding method for a plan is changed, the new funding method

shall become the funding method used to determine costs and liabilities under the plan only if the change is approved by the Secretary of the Treasury. If the plan year for a plan is changed, the new plan year shall become the plan year for the plan only if the change is approved by the Secretary of the Treasury.

(6) If, as of the close of a plan year, a plan would (without regard to this paragraph) have an accumulated funding deficiency (determined without regard) to the alternative minimum funding standard account permitted under subsection (g) in excess of the full funding limitation --

(A) the funding standard account shall be credited with the amount of such excess, and

(B) all amounts described in paragraphs (2), (B), (C), and (D) and (3)(B) of subsection (b) which are required to be amortized shall be considered fully amortized for purposes of such paragraphs.

(7) For purposes of paragraph (6), the term "full funding limitation" means the excess (if any) of --

(A) the accrued liability (including normal cost) under the plan (determined under the entry age normal funding method if such accrued liability cannot be directly calculated under the

funding method used for the plan), over

(B) the lesser of the fair market value of the plan's assets or the value of such assets determined under paragraph (2).

(8) For purposes of this part, any amendment applying to a plan year which --

(A) is adopted after the close of such plan year but no later than 2-1/2 months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances,

shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such

amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was file, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 303(b) [29 USCS § 1083 (b)]) and that waiver under section 303(a) [29 USCS § 1083(a) is unavailable or inadequate.

(9) For purposes of this part, a determination of experience gains and losses and a valuation of the plan's liability shall be made not less frequently than once every 3 years, except that such determination shall be made more frequently to the extent required in particular cases under regulations prescribed by the Secretary of the Treasury.

(10) For purposes of this part, any contributions for a plan year made by an employer after the last day of such plan year, but not later than 2-1/2 months after such day, shall be deemed to have been made on such last day. For purposes of this paragraph, such 2-1/2 month period may be extended for not more than 6 months under regulations prescribed by the Secretary of the Treasury.

(d) Cross reference. For alternative amortization method for certain

multiemployer plans see section 1013(d) of this Act [26 USCS § 412 note].

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 3, § 302, 88 Stat.896; Sept. 26, 1980, P.L. 96-364, Title III, § 304(b), 94 Stat. 1293.)

29 USCS 1102

§ 1102. Establishment of plan

(a) Named fiduciaries.

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan of (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan. Every employee benefit plan shall --

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan

(including any procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)]),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features or plan. Any employee benefit plan may provide --

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)], may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan. Any employee benefit plan may provide --

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)], may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 4, § 402, 88 Stat.875.)

29 USCS 1104

§ 1104. Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d), 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3)]29 USCS § 1107 (d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407 (d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

(b) Indicia of ownership of assets outside jurisdiction of district courts. Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary. In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the

Secretary) --

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat.877; Sept. 26, 1980, P.L. 96-364, Title III, § 309, 94 Stat. 1296.)

29 USCS 1132

§1132. Civil Enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025 (c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USCS §§ 401(a), 403(a), or 405(a)] (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respct [respect] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 et seq., §§ 1081 et. seq.] (relating to participation, vesting, and funding), only if --

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall

prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS § 1145].

(c) Administrator's refusal to supply requested information. Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity.

(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of

the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USCS § 1145] in which a judgment in favor

of the plan is awarded, the court shall award the plan --

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of --

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954 [26 USCS § 6621].

(h) Service upon Secretary of Labor and Secretary of the Treasury. A copy of

the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USCS §§ 1101 et seq.] If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section 406 [29 USCS § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975 (f)(4) of the Internal Revenue Code of 1954 [26 USCS § 4975(f)(4)]); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of such Code [26 USCS § 4975(f)(5)]) within 90 days after notice from the Secretary (or such

longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USCS § 4975(e)(1)].

(j) Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code [28 USCS § 518(a)]), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of action against Secretary of Labor. Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(Sept. 2, 1974, P.L. 93-406, Title I, Subtitle B, Part 5, § 502, 88 Stat. 89]; Sept. 26, 1980, P.L. 96-364, Title III, § 306(b), 94 Stat. 1295.

28 USCS 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) by certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch 646, § 1, 62 Stat.928; June 27, 1988, P.L. 100-352, § 2(a),)b), 102 Stat. 662.)